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IN THE

Supreme Court of the United States

No. 70-75.

MOOSE LODGE NO. 107,

Appellant,

v.

K. LEROY IRVIS, et als.

On Appeal From the United States District Court for the Middle District of Pennsylvania.

BRIEF FOR APPELLEE, K. LEROY IRVIS.

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BRIEF FOR APPELLEE, K. LEROY IRVIS.

STATUTES INVOLVED.

Moose Lodge has set forth most of the constitutional provisions, statutes and regulations involved. For the sake of completeness we here recite the language of Section 1343(3) of Title 28, United States Code:

"§ 1343. Civil rights and elective franchise

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statutes, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . ."

QUESTIONS PRESENTED.

1. Has Irvis, in alleging that the Pennsylvania Liquor Code, as applied by the Pennsylvania Liquor Control Board, violated the Fourteenth Amendment, in requesting declaratory and injunctive relief restraining the Liquor Control Board in the enforcement and execution of the Liquor Code as applied and in seeking relief designed to redress the deprivation of his right not to be denied the equal protection of the laws without infringing upon any right of private persons to associate freely among themselves (a) stated a cause of action within the jurisdiction of a three-judge federal court under 28 U. S. C. § 1343(3) and 28 U. S. C. § 2281 and, hence, within the jurisdiction of this court on direct appeal under 28 U. S. C. § 1253 and (b) presented and maintained a case or controversy subject to determination by the exercise of judicial power under Article III of the United States Constitution?

2. Does the Pennsylvania scheme of alcoholic beverage control as established by the Pennsylvania Liquor Code, insofar as it involves the issuance of a liquor license to a private fraternal organization whose membership and facilities are limited to white males who are not married to anyone other than white females, whose use of that license is subject to extensive regulation pursuant to the provisions of the Pennsylvania Liquor Code and the regulations of the Pennsylvania Liquor Control Board promulgated thereunder and whose purposes and activities are materially benefited by the possession and use of such license, constitute state support for the racially discriminatory practices of the club in violation of the Equal Protection Clause of the Fourteenth Amendment?

3. Did the court below, in directing termination of the club liquor license held by the Moose Lodge and in enjoin-

ing the Pennsylvania Liquor Control Board from reissuing a license to the Moose Lodge as long as it continued its racially discriminatory practices, fashion a remedy appropriate and proper to the facts presented and legal principles decided in the case?

4. Has an action for redress of the deprivation of the constitutional right to equal protection of the laws, brought pursuant to 42 U. S. C. § 1983, been precluded or limited in any way by enactment of Title II of the Civil Rights Act of 1964 which provides for injunctive relief against discrimination in places of public accommodation?

STATEMENT.

This action was brought by K. Leroy Irvis (Irvis) pursuant to 42 U. S. C. § 1983 for the redress of the deprivation of his right not to be denied the equal protection of the laws by the Pennsylvania Liquor Control Board (Board) and Moose Lodge No. 107, Harrisburg, Pennsylvania (Moose Lodge), acting under color of law (A. 3). Irvis sought declaratory and injunctive relief on the ground that the Pennsylvania Liquor Code (Liquor Code), Act of April 12, 1951, Pamphlet Laws 90, as amended, 47 Pa. Stat. Ann. §§ 1-101 to 9-902, pursuant to which the Moose Lodge was the holder of a private club liquor license, violated the equal protection clause of the Fourteenth Amendment (A. 7, 8).

On December 29, 1968, Irvis, a Negro citizen of the United States, entered the premises of Moose Lodge and requested service of food and beverage (A. 6). Solely because he is a Negro, he was refused service (A. 6).

Moose Lodge, a Pennsylvania non-profit corporation (A. 28), is a member lodge of the Loyal Order of Moose and is governed by the constitution and by-laws of the Loyal Order of Moose (A. 20, 21). One of these governing provisions restricts membership in Moose Lodges to any white male who is not married to anyone except a white female[1] (A. 21). Thus, neither Irvis nor any other Negro may become a member of a Moose Lodge and enjoy any of the benefits or participate in any of the activities of a Moose Lodge even though he may meet all other qualifications for membership (A. 21, 23). The sole fact of being a Negro bars him (A. 23).

Moose Lodge is a benevolent and fraternal organization whose purposes also are set forth in the Constitution of the Loyal Order of Moose. These purposes encompass a variety

1. *E.g.*, A white American male married to a Japanese female is ineligible.

of praiseworthy objectives of a fraternal nature, including the objective "to encourage tolerance of every kind." (A. 22). The accomplishment of these objectives by common action is limited to white persons (A. 22).[2]

Moose Lodge is a "private club" within the common meaning of that term. Membership is restricted and can be attained only through a process of invitation, application, investigation and secret voting (A. 23). The social activities carried on in the club are open only to members or their properly invited guests (A. 23, 24). In the second sentence of paragraph 4(a) of the Stipulation agreed to by the parties (A. 23) a partial equation is made between these activities and those carried on in the home. Fairly read, this sentence indicates that members of Moose Lodge eat, drink, converse, watch television, play cards, etc., at the Lodge home similar to the way individuals eat, drink, converse, watch television, play cards, etc., in their own home. This similarity is subject, however, to several major qualifications. For one, a member may not freely enter another member's home (i.e. without invitation), although he may freely enter the Lodge home (A. 23). For another, no member must obtain any license from the Board in order to carry on any activities in his home whereas a liquor license is necessary in order to drink at the Lodge home (A. 23). A third difference, although not specifically referred to in the stipulated sentence, is that the drinking of alcoholic beverages in a member's home is not a purchase and sale transaction; while at the Lodge home members acquire alcohol only by purchasing it by the drink.

Moose Lodge conducts its activities in its own building (A. 24). It received no public funds in connection with the

2. A full statement of these purposes is contained in footnote 2 of the opinion of the court below (A. 23).

construction of this building or in connection with any of its other activities (A. 24). It conducts no publicly-associated activities (A. 24, 25).

Moose Lodge is also a "club" within the statutory definition contained in the Liquor Code (A. 6). This definition (A. 15) supports the concept of "private club" described above and is limited to organizations which do not maintain quarters open to the public.

Because it qualifies as a club under the Liquor Code, Moose Lodge is entitled to and has received a club liquor license from the Board (A. 6, 25). The grant of such a license is made pursuant to the specific authority of the Liquor Code[3] (A. 4, 25). Once having received such a license, Moose Lodge is thereby entitled to purchase liquor from a state liquor store, to keep liquor at the Lodge home and to sell liquor (as well as malt or brewed beverages) to members for consumption at the Lodge home (A. 4, 25). The importance of this license to the Moose Lodge is reflected in the agreements of the parties that the receipt and ownership of the license by Moose Lodge is a "valuable privilege" (A. 4, 25) and that the loss of this license would cause Moose Lodge to lose membership and would impair its capability to carry out its benevolent purposes and to contribute to the purposes of the Supreme Lodge (A. 19, 20, 25).

The Board is an agency of the Commonwealth of Pennsylvania charged with responsibility for supervising the

3. Henceforth all references to this statute simply will be to the "Liquor Code" or to a specific section of the Liquor Code. All official section numbers in the Pamphlet Laws are ascribed the same number in Purdon's Pennsylvania Annotated Statutes, Title 47, except that the Latin article number contained in the Pamphlet Laws precedes (in arabic numeral form) the official section number. Hence, section 404 of Article IV of the Liquor Code becomes section 4-404 of Title 47 of Purdon's.

All references to specific sections of the Liquor Code will refer to the appropriate page of Appendix F to the Jurisdictional Statement.

administration and conduct of Pennsylvania's comprehensive alcoholic beverage control system (A. 3, 4, 25). This system is provided for and governed by the Pennsylvania Liquor Code (A. 4, 25). The Liquor Code is a plenary statutory enactment dealing with all aspects of the manufacture, possession, sale, consumption, importation, use, storage, transportation and delivery of alcoholic beverages in Pennsylvania and of the licensing of individuals and organizations with respect to such activities (A. 4, 25).

Included among the Code's provisions are sections granting extensive regulatory authority to the Board to carry out the statutory mandate. Section 207, subsection (i) (p. 15), contains a general grant of power to regulate and states that the Board's regulations "shall have the same force as if they formed a part of this act." Section 208, subsection (h) (p. 16), provides specific regulatory power over the "issuance of licenses" and the "conduct, management, sanitation and equipment of places licensed. . . ."

The Liquor Code and the Board's regulations contain a variety of requirements which must be met by a private club to receive a liquor license (A. 5, 25) and which govern the conduct of licensees (A. 5-6, 25). However, nothing in the Liquor Code or in the Board's regulations contains any requirement, restriction or regulation regarding the issuance of a license to a private club licensee which discriminates on racial grounds; and the Board has no power to consider the racially discriminatory practices of a private club in its exercise of authority (A. 6, 25).

In addition, licenses (both for the sale of liquor and malt or brewed beverages) are not freely available throughout Pennsylvania for two reasons. First, Pennsylvania follows a policy of local option; and § 472 of the Liquor Code (pp. 61-62) prohibits the granting of licenses (including club licenses) unless a majority of voting electors of the

local municipality vote in favor of doing so. This limited form of "prohibition" does not affect what one can or does do in his own home, however, because anyone over the age of twenty-one years may purchase liquor or wine at a state store or beer from a distributor, take it to his home, and consume it there even if his home is in a "dry" locality. The restrictions in section 472 are on the granting of licenses and the establishment of state stores.

Second, Pennsylvania imposes a maximum quota on the number of licenses which may be granted in any municipality which has voted in favor of granting them. Section 461 of the Liquor Code (pp. 50-52) provides that not more than one license shall be granted for each fifteen hundred inhabitants in any municipality.[4] However, the count does not include club licenses until the quota is otherwise actually filled, thus imposing a curious form of monopoly on the system. This feature, as well as other aspects of Pennsylvania's liquor control system, will be discussed in greater detail in the body of Irvis' argument.

Alleging that Moose Lodge and the Board, acting under this state-wide, statutorily-mandated scheme of licensing, regulation and monopoly, insofar as it caused club liquor licenses to be issued and renewed to private clubs which discriminated against Negroes in their facilities, services and privileges, had violated his right to the equal protection of the laws as guaranteed by the Fourteenth Amendment, Irvis sought declaratory and injunctive relief (A. 7-9). Because the core of Irvis' complaint necessarily involved a question of the constitutionality of the Liquor Code as applied, Irvis requested that a three-judge district court be convened, pursuant to 28 U. S. C. §§ 2281 and 2284 (A. 7).

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4. The "Quota Law," Act of June 24, 1939, Pamphlet Laws 806, 47 Pa. Stat. Ann. §§ 744-1001 to 744-1003, does not affect club licenses. It applies only to a limited number of older hotel licenses.

Agreeing that the action involved the enforcement, operation and execution of a state statute, the district judge to whom the application was presented notified the chief judge of the circuit who designated the two additional judges to hear the action (A. 9-10).

Both defendants moved to dismiss the action for failure to state a claim (A. 11-12). Following denial of these motions (A. 12-13), the Moose Lodge and the Board filed answers (A. 14-20). All parties then filed stipulations of facts (A. 20-26, 28-29). Irvis moved for summary judgment (A. 27).

The court below first noted that racial discrimination was both required by the Constitution of the Supreme Lodge and practiced by the local Moose Lodge (A. 33). It referred to the unique nature of the power exercised by the sovereign over the sale, possession and use of intoxicating liquor and the consequent inherent difference between the regulation involved in granting a liquor license and that involved in the granting of other forms of licenses (A. 34).

After reviewing the nature and extent of Pennsylvania's exercise of authority over the alcoholic beverage field, the court concluded (A. 37):

> "It would be difficult to find a more pervasive interaction of state authority with personal conduct . . . The unique power which the state enjoys in this area, which has put it in the business of operating state liquor stores and in the role of licensing clubs, has been exercised in a manner which reaches intimately and deeply into the operation of the licensees."

It went on (A. 38):

> "Here the state has used its great power to license the liquor traffic in a manner which has no relation to the

traffic in liquor itself but instead permits it to be exploited in the pursuit of a discriminatory practice."

Thus finding state support and encouragement of Moose Lodge's racial discrimination, the court held (A. 40) that the grant of a liquor license to Moose Lodge was in violation of the equal protection clause of the Fourteenth Amendment.

The court subsequently entered a final decree so holding, directing termination of Moose Lodge's license and enjoining the Board from reissuing a license to Moose Lodge as long as Moose Lodge continued its policy of racial discrimination (A. 41-42).

Moose Lodge moved to modify this decree (A. 42-44). In essence, it asked that the court below allow it to continue its racially discriminatory membership policies but to require it to serve non-Caucasians who are brought to the Lodge's home as guests of members whenever guests "may be invited." (A. 43).[5]

Irvis opposed this motion (A. 44-47). He pointed out that this proposed modification would not eliminate state support for Moose Lodge's racial discrimination since the "service of liquor under the privilege granted by the club liquor license is inextricably interwoven with the privileges of membership in Defendant Moose Lodge" (A. 46).

The motion to modify was denied (A. 48). Moose Lodge filed a timely notice of appeal (A. 2). It also filed a motion for a stay which was granted (A. 2).

Following Moose Lodge's docketing of its appeal in this Court and Irvis' filing of a motion to affirm, the Court postponed probable jurisdiction to the hearing of the case on the merits.

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5. This proposal is discussed more fully below in part I.B of this brief.

SUMMARY OF ARGUMENT.

I. Solely because he is a Negro, Irvis was subjected to an act of racial discrimination by Moose Lodge. This act deprived him of rights secured to him by the Fourteenth Amendment to the Constitution because Moose Lodge is the holder and beneficiary of a Pennsylvania club retail liquor license granted to it by the Pennsylvania Liquor Control Board acting pursuant to provisions of the Pennsylvania Liquor Code.

A. Seeking redress for this deprivation of his rights, Irvis brought this action under 42 U. S. C. § 1983. In his complaint he sought relief declaring that the Pennsylvania Liquor Code, as applied, was unconstitutional in requiring the issuance and renewal of a liquor license to a private club such as Moose Lodge which engages in invidious racial discrimination. He also sought injunctive relief requiring the Board to revoke and not to renew the license of Moose Lodge and to issue regulations barring the issuance and renewal of club liquor licenses to other organizations which engaged in racial discrimination.

Because Moose Lodge's act of racial discrimination constituted State action and was committed by Moose Lodge with support from the Pennsylvania Liquor Code, Irvis properly stated a cause of action under 42 U. S. C. § 1983; and the District Court had jurisdiction under 28 U. S. C. § 1343(3). *United States v. Price*, 383 U. S. 787; *Adickes v. S. H. Kress & Company*, 398 U. S. 144.

In addition, because Moose Lodge's racial discrimination drew its support from the application of statutory provisions, Irvis called into question the validity of that statute, alleging that it was in conflict with provisions of the Fourteenth Amendment to the Constitution. Because of this and because Irvis requested an injunction restraining

the enforcement, operation or execution of the Pennsylvania Liquor Code by restraining the action of the Pennsylvania Liquor Control Board in its enforcement or execution of this statute, the convening of a three-judge district court was requested. 28 U. S. C. § 2281. Both the district judge to whom his request was presented and the chief judge of the Court of Appeals for the Third Circuit agreed with Irvis, and a three-judge district court was convened.

All of the elements required to convene a three-judge district court are present here. Irvis alleged the unconstitutionality of the Pennsylvania Liquor Code, as applied. *Turner v. Fouche,* 396 U. S. 346. He sought injunctive relief against officers of the Commonwealth of Pennsylvania having state-wide jurisdiction in their enforcement of this statute. Although he made specific reference to the discriminatory actions of Moose Lodge in order to clarify the issues, Irvis' constitutional challenge clearly extended to all similar situations. The requirement that a three-judge district court be convened in such a case recently has been recognized by this Court in proceedings brought to challenge application of provisions of a federal statute. *Flast v. Cohen,* 392 U. S. 83.

Since the court below granted injunctive relief, the appeal from its action was properly taken to this court. 28 U. S. C. § 1253.

No liquor licenses can be granted or renewed in Pennsylvania except pursuant to the provisions of the Pennsylvania Liquor Code. The Code is a comprehensive state enactment by which Pennsylvania exercises virtually plenary control over all aspects of the manufacture, importation, sale and disposition of alcoholic beverages within Pennsylvania. It does this through the medium of the Liquor Control Board, a duly constituted administrative agency of the Commonwealth of Pennsylvania.

The Liquor Code grants to the Board authority to issue liquor licenses to various types of licensees, including clubs. The conditions under which licenses are to be granted and renewed are specified in great detail in the Liquor Code; none of these conditions relate in any way to the practice of racial discrimination by a club licensee. The Board has no power to refuse to issue or renew or to revoke or suspend any license because of racial discrimination practiced by a licensee; consequently, only the validity of the Liquor Code itself, as applied, and not its administration by the Board is properly called into question here. For this reason a three-judge court was required, and the appeal is properly before this Court.

B. While agreeing that Irvis properly stated a cause of action requiring the convening of a three-judge district court, Moose Lodge, nevertheless, now takes the position that Irvis has presented no case or controversy subject to judicial determination. It takes this position despite the fact that Irvis has maintained a consistent position throughout the proceeding. He has sought to redress the deprivation of his rights as a Negro citizen by requesting severance of the relationship between the State and Moose Lodge, leaving Moose Lodge free, if it so desires, to continue to discriminate on racial grounds and removing the State from participation in this discrimination.

But Moose Lodge characterizes this position as one which only seeks to "punish" Moose Lodge and one in which Irvis has no more interest than any other citizen of Pennsylvania. Apparently Moose Lodge is claiming either that Irvis is seeking an advisory opinion or has no standing to maintain this action. These arguments completely overlook the facts that Irvis has been discriminated against on racial grounds, that the discrimination constitutes State action and that the most appropriate relief under such cir-

cumstances is to eliminate the State action and leave the private club free to discriminate. Irvis is not just any citizen; he is *the* citizen against whom the discrimination was practiced; and he has a right to seek redress by asking that the State's support for the discriminatory practices of Moose Lodge be terminated.

The issue is really one of "justiciability," a doctrine on which the Court has recently commented, *Flast v. Cohen*, 392 U. S. 83, in connection with its review of the issue of standing. Its purposes are to limit the business of the courts to adversary proceedings and to enforce the separation of governmental powers. As it reflects on the issue of standing, it suggests the question of whether or not a complainant is a proper party to seek resolution of an issue in the courts.

By all standards this case presents a justiciable controversy. Irvis has been injured. He has been injured not just because Moose Lodge practiced racial discrimination but because it did so with the support of the State. He seeks redress for his injury by requiring the State to withdraw its support, and he has chosen to do so by asking the court to act in accordance with powers conferred upon them by law in a traditional adversary context. The case involves no question of separation of governmental powers, no political question and raises no question of mootness. Irvis, who seeks to insure that private clubs holding State-granted liquor licenses afford equal membership opportunity to all citizens of Pennsylvania and that those who choose not to afford such opportunity do not hold liquor licenses, does so because of the personal injury suffered by him as a result of the existing situation. No clearer case or controversy could exist.

Moose Lodge's complaint that its motion to modify the decree should have been accepted by both Irvis and the

court below is misplaced. This modification only would have allowed Irvis to enter the premises of Moose Lodge if he were invited to do so by a member. It would give to Irvis no particular rights, and it would in no way eliminate the State's support for Moose Lodge's racial discrimination. Indeed, in view of the fact that the Loyal Order of Moose has recently amended its general laws to restrict the admission of guests to Lodge premises to persons "who are eligible for membership in the Fraternity," a restriction which effectively eliminates all Negroes as guests, this particular objection voiced by Moose Lodge is difficult to understand.

Since Irvis brought and maintained a controversy subject to the jurisdiction of a three-judge federal district court and to this Court on appeal, the merits of his case must be reached.

II. No State may conduct itself in such a way that it commands or supports or encourages or becomes involved in the invidious racial discrimination of a private party. This is a protection afforded to all persons by the Fourteenth Amendment. It applied to all forms of state involvement, direct or indirect, central or peripheral. *Civil Rights Cases,* 109 U. S. 3, *United States v. Guest,* 383 U. S. 745. The practice of racial discrimination by private organizations such as Moose Lodge may well be an unfortunate consequence of the right of private persons to be prejudiced; but when such a private organization calls upon the State to provide it with the type of support received from the possession and use of a state liquor license and to become involved in the regulation of its affairs as a result thereof, the effect can only be to breed suspicion in government. For this reason the state action doctrine condemns such state support and involvement.

A. Here, Pennsylvania's involvement is extensive; and its support is marked. Through its Liquor Code, Pennsylvania exercises plenary authority over all aspects of the field of alcoholic beverages. No club may sell alcoholic beverages to its members unless it holds a state liquor license. In order to obtain such a license, it must follow the provisions of the Liquor Code with precision. These provisions are highly detailed, and they impose a variety of requirements upon all applicants for licenses. Certain of these requirements have special application to club applicants. A license, once granted, must be renewed annually.

The Liquor Code contains several provisions restricting the issuance of licenses generally. One of these provisions forbids the issuance of any licenses in a municipality unless the electors of that municipality have approved the granting of licenses. Another provision, moreover, limits the number of licenses which may be issued in any municipality where the electors have voted in favor of the granting of licenses. The presence in the Liquor Code of these "local option" and "quota" provisions effectively restricts the number of licenses which may be granted and imparts a certain franchise value to all existing licenses.

To support these and the multitude of other permissive and regulatory provisions of the Liquor Code, the Liquor Control Board is given power to promulgate and enforce regulations. Its regulatory powers are co-extensive with the provisions of the Liquor Code; and its regulations, read in conjunction with the Code, evidence the existence of a unique and far-reaching state regulatory system. In a sense it may be said that the State is a "partner" of every licensee.

The situation is totally different from that which exists in connection with what we usually think of in terms of state-granted licenses. Most licenses are granted to enforce standards of health and safety or to provide a central record

of business or other activities or to give evidence that a person has met certain business or professional standards. All of these are for the benefit of the public; none of them involves regulatory authority as extensive as that present in Pennsylvania's alcoholic beverage control system; and none of them brings to the possessor the special financial benefits that accrue to the possession and use of a liquor license.

For the liquor license granted by the State of Pennsylvania to Moose Lodge is a mainstay of Moose Lodge's financial well-being. In an area of activity in which the State could have chosen not to grant any liquor licenses to private clubs at all, *Crowley v. Christensen,* 137 U. S. 86, Pennsylvania has chosen to provide Moose Lodge with economic benefits. Several factors contribute to this. First, as already noted, licenses are not freely available; and the holder of a license is a participant in a closed system. Second, Moose Lodge, as the holder of a license, may purchase liquor from Pennsylvania State Liquor Stores at wholesale prices, unlike Irvis and other individuals who must pay full retail prices at these stores. Third, after having purchased liquor at wholesale prices, Moose Lodge sells it to its members as an income-producing activity, unlike Irvis and other individuals who are forbidden to sell liquor which they purchase at Pennsylvania Liquor Stores. Fourth, Moose Lodge, and other private clubs, are allowed to sell alcoholic beverages during hours at which no other licensees may sell them. Only private clubs may sell on Sunday in the same way that they can sell on weekdays, and only private clubs may sell on election days. In addition, private clubs are not restricted, as are all other licensees, with respect to the percentage of food sales which they must have before they can sell at all on Sunday.

Finally, and most important, the record is clear that without the liquor license Moose Lodge would lose member-

ship and find it more difficult to carry on its fraternal purposes and activities. This clearly-stated expression of the direct financial value to Moose Lodge of the liquor license conferred upon it by the State, perhaps more than any other single factor, illustrates the major importance of the license to Moose Lodge and of the State support which it reflects. The benefits realized by Moose Lodge are substantial, and they flow directly and immediately from its possession and use of the license.

Moreover, the Commonwealth of Pennsylvania benefits from the relationship as well. While it is not as dependent on the return to it from a single licensee as Moose Lodge is on the possession and use of its single license, the Commonwealth nevertheless receives funds from Moose Lodge through the latter's purchase of liquor at Pennsylvania State Stores and payment of license fees. Since Pennsylvania realizes substantial sums annually from the operation of its alcoholic beverage control system, it cannot be said that the benefits received by it are only incidental.

B. All of these factors result in a situation in which Pennsylvania has become significantly involved in the racial discrimination practiced by Moose Lodge. This is precisely the "state action" which the Fourteenth Amendment forbids.

The central inquiry in all situations like this one focuses on what the State has done, not on the nature of the private discriminating party or the activity carried on by it. The cases are at one in illustrating this conclusion. They have attempted to determine, e.g., whether the State has "commanded" discrimination, "supported" discrimination or "encouraged" discrimination. *Peterson v. City of Greenville*, 373 U. S. 244; *Lombard v. Louisiana*, 373 U. S. 267; and *Robinson v. Florida*, 378 U. S. 153. They have attempted to determine if the various indicia of state involvement are

sufficient to create a situation of mutual benefit between state and private party. *Burton v. Wilmington Parking Authority*, 365 U. S. 715. They have attempted to determine if the State has sanctioned or encouraged discrimination through actions taken by it which support discrimination by private parties. *Reitman v. Mulkey*, 387 U. S. 369.

If state action is present when a State leases premises to a private party which discriminates, as it was in *Burton*, how can it not be present when a State grants a financially beneficial liquor license to a discriminating private party? These relationships create a situation in which the State "must be recognized as a joint participant in the challenged activity" (*Burton v. Wilmington Parking Authority*, 365 U. S. 715). If state action is present where a State provides affirmative support for the private right to discriminate, as it was in *Reitman*, how can it not be present where state law requires the issuance of a liquor license to a discriminating private party free from sanction or interference from the State? In all of these situations the State has done something which supports the discrimination of the private party and/or involves the State in that discrimination; and this is the critical factor which leads to a similar finding of state action here.

We may add to all this the presence and impact of the extensive state regulatory authority over its liquor licensees. This authority itself is sufficient state action to produce a violation of the Fourteenth Amendment in Moose Lodge's racial discrimination against Irvis. *Public Utilities Commission of the District of Columbia v. Pollak*, 343 U. S. 451. When coupled, however, with the financial support realized by Moose Lodge from its possession and use of the liquor license, the existence of this regulatory authority clearly confirms the presence of state action here.

Recently (June 28, 1971) the Court struck down State statutes providing financial aid to private and parochial

schools in Pennsylvania and Rhode Island. *Lemon v. Kurtzman*, 91 S. Ct. 2105. It found that these statutes tended to produce a relationship between State and religion which fostered "excessive entanglement" and that this condition violated the constitutional prohibition against the establishment of religion. We find in this determination an appropriate analogy to the relationship between Pennsylvania and Moose Lodge in which there exists a "substantial involvement" of Pennsylvania in the invidious racial discrimination practiced by Moose Lodge and a resulting violation of the Fourteenth Amendment.

We find no support in the announced principles of the state action doctrine for Moose Lodge's theory that its purely private nature immunizes it here. Whether or not the private discriminating party has "public" attributes or performs a "public" function or receives "public" funds is immaterial to a determination of whether state action is present. In every case there is a "public" aspect in the presence of the State; there may or may not be a "public" aspect to the actions of the private party. Clearly, if Pennsylvania had leased a state-owned building to Moose Lodge or appropriated money directly to Moose Lodge from State funds, state action would be present because of what the State would have done; yet nothing would have changed with respect to Moose Lodge. It would still be a purely private organization carrying on its own private functions. But because of the involvement and support of the State, Moose Lodge's racial discrimination would be state action and would be subject to redress.

C. The court below made a distinction between private clubs which restrict membership on racial grounds and private clubs which do so on religious or ethnic grounds. The distinction, as phrased by the court below, is too broadly worded; but it is, nevertheless, a valid one. The

heart of the distinction lies in the difference between a rational restriction on membership and an irrational one. Where the membership limitation is reasonably related to the valid, good faith purposes and functions of the organization, it is a proper one. On the other hand, if the membership limitation has no rational connection with the purposes and functions of the organization, it is improper and must be invalidated. This is particularly so if the restriction is based on racial grounds.

The test is a simple one: recognizing that a racial limitation is particularly suspect, is the membership limitation involved reasonably related to the actual objects and purposes of the organization. This test has three aspects. First is the special character of racial classifications. The second is the need for the restriction to be reasonably related to the organization's purposes. Third is the requirement that the organization's purposes are stated and followed in good faith. If all of these elements are satisfied, then any discrimination which may be present in the membership limitations cannot be considered "invidious."

We take this to be the real meaning of what the court below was attempting to say. In any event it is what Irvis believes to be the case and what we believe this Court should approve.

III. The decree entered by the court below both gave full and proper effect to its determination that state action was involved in the racial discrimination practiced by Moose Lodge and to any rights of privacy and private association to which the members of Moose Lodge are entitled.

A. Having found state action here, the court below recognized the private nature of the discriminating party and determined that the proper way of handling the situation was to decree a severance of the relationship between

State and Moose Lodge. It did this not by ordering the revocation of Moose Lodge's license but simply by ordering that the license be terminated and cancelled subject to being reissued if Moose Lodge decides to change its racially discriminatory policies.

A decree, such as is suggested by Moose Lodge, that the Court should simply have enjoined the Board from enforcing in full its regulation which requires a club licensee to adhere to all of the provisions of its constitution and by-laws neither is justified by the position announced by the court below (since its decision was not based upon the existence of this regulation) nor is reflective of the purpose of the regulation (which is simply to insure that a private club is, in fact, a club). While Irvis would not object if the decree, *in addition to what it actually contains,* also contained a paragraph enjoining the Board from enforcing this regulation to the extent that it has the effect of seeming to require racial discrimination by a private club licensee, he suggests that a decree which contained no more than this one directive from the Court would be meaningless and dysfunctional with respect to the necessities of the situation.

B. No constitutionally-protected rights of privacy and private association are involved here. These rights have been carefully guarded and preserved by the Court in order to protect free expression of political beliefs and interests and would similarly apply where economic, religious or cultural beliefs and interests are involved. *Bates v. Little Rock,* 361 U. S. 516; *N. A. A. C. P. v. Alabama,* 357 U. S. 449. In these cases state governments have attempted to inquire into the associational aspects of groups expressing dissident political views; and while the Court recognized that a State may have a legitimate interest in making such inquiries, it found none in the situations presented which overrode the right of association.

No case has ever held that the right to possess and use a state-granted liquor license is necessary in order to advance the type of interests and beliefs which lie at the heart of the right of private association. It is unlikely that any case would or should do so. Pennsylvania could, if it so wished, simply solve the present situation by amending its Liquor Code to eliminate all private club liquor licenses. Moose Lodge would then face exactly the same problems as it faces as a result of the decree in this case. In either situation, however, the problems would not arise as a result of some infringement on the right of private association; they would arise because the members of Moose Lodge voluntarily decide that their interests in the right of private association are subsordinate to their personal and social interests in obtaining alcoholic beverages. We do not deny that there is pleasure in obtaining a drink at a club bar; we do deny that this pleasure rises to the same constitutional stature as the right of advancing ideas and beliefs through associational activities.

Even were we to assume, for the moment, that some right of private association is here involved, we must still recognize that Irvis has a corresponding right to be free from state-supported racial discrimination. In the cases in which the Court has considered the right of private association, it has always attempted to balance the rights of the individuals involved against the interest expressed in limiting those rights. Here, too, a balancing of interests could be made. Where assertion of the right of private association seeks to advance ideas and beliefs central to the exercise of the rights of free speech and free assembly, such as political advocacy, then the balancing may favor the right of private association regardless of the possible discrimination which may result. Where, however, the right of private association is asserted simply to advance common

social or fraternal interests, the balancing of interests should favor the determinatin that state-supported racial discrimination must terminate. Only in this way can proper deference be paid to the competing constitutional interests which may be involved.

IV. Moose Lodge argues that Congress, in passing Title II of the Civil Rights Act of 1964 and including an exception for private clubs in that Title, has marked a constitutional boundary between the right of private association and the right to be free from racial discrimination which the Court should apply here. It asserts this position on the basis that the Civil Rights Act of 1964 was a statute enacted to enforce the Fourteenth Amendment.

A. The history of Title II does not support Moose Lodge's argument. When President Kennedy asked Congress to take action in this field, he called attention to the powers of Congress both under the Commerce Clause and the Fourteenth Amendment. When Congress acted in response to this request, its hearings, its reports and its debates all indicate, first, that it did so primarily in reliance on its powers under the Commerce Clause, not the Fourteenth Amendment, and, second, that the exception for private clubs was solely an expression of legislative policy not to deal with discrimination in private clubs through the medium of the provisions of Title II.

When the Court sustained Title II, *Heart of Atlanta Motel, Inc. v. United States*, 379 U. S. 241, it did so as a proper exercise by Congress of its power under the Commerce Clause. It also noted that Congress' powers under the Commerce Clause are plenary and extend to the regulation of private persons where required. These conclusions indicate, just as do the executive and legislative input into

this history, that in excepting private clubs Congress was not reflecting upon its powers under the Fourteenth Amendment and attempting to draw a fine constitutional line between the right of private association and the right to be free from state-supported discrimination. In view of its powers under the Commerce Clause such a line would be unnecessary.

The Court has also indicated that nothing in Title II precludes an action for redress of a deprivation of constitutional rights provided for under 42 U. S. C. § 1983. *Adickes v. S. H. Kress & Company,* 398 U. S. 144. Since this is so with respect to conduct which violates both Title II and § 1983, it would be hard to justify any different conclusion for conduct which is not covered by Title II but which otherwise violates 42 U. S. C. § 1983, as is present here.

B. We have already noted that the Commerce Clause gives to Congress the power to act with respect to private persons and groups completely apart from the state action restriction imposed by the Fourteenth Amendment. The Commerce Clause is not the sole source of such Congressional power, however.

The Thirteenth Amendment, in its abolition of slavery, is self-executing. *Civil Rights Cases,* 109 U. S. 3; *Jones v. Mayer Co.,* 392 U. S. 409. In addition, the Thirteenth Amendment gives enforcement power to Congress. In exercising such power, Congress may pass all laws necessary to abolish all badges and incidents of slavery. *Civil Rights Cases,* 109 U. S. 3; *Griffin v. Breckenridge,* 91 S. Ct. 1790. We consider it reasonable to conclude that the Thirteenth Amendment, as a self-executing doctrine, carries with it the same breadth of action as is given to Congress to enforce it. Therefore, either directly through the Thirteenth Amendment or by Congressional action, all badges and incidents of slavery are or could be abolished.

The invidious racial discrimination engaged in by Moose Lodge is certainly a badge and incident of slavery. Its elimination should certainly take precedence over any right of private association involved in membership in a private fraternal organization.

Moreover, the "could be" possibility through Congressional action has long been a reality as a result of the existence of 42 U. S. C. § 1981. This provision applies to private action and can be taken to forbid racial discrimination in private contracts. Since the relationship between an individual and his club is a contractual one, it should be subject to § 1981; and any racial discrimination involved in that contract should be void.

Thus, either by direct application of the Thirteenth Amendment or by Congressional action pursuant to the powers given Congress under the Commerce Clause or the Thirteenth Amendment, private racial discrimination may be reached without any consideration of state action. These possibilities support the conclusion already reached with respect to Title II of the Civil Rights Act of 1964 that Congress undoubtedly was doing no more, in excepting private clubs from the application of Title II, than making clear its policy decision that private clubs (like private homes) were not to be considered places of public accommodation.

ARGUMENT.

I. Irvis Has Stated and Maintained a Case or Controversy Within the Jurisdiction of a Three-Judge Federal District Court and of This Court on Direct Appeal From the Final Decree of the District Court.

A. The Complaint Stated a Cause of Action Within the Jurisdiction of a Three-Judge Federal District Court.

Following Moose Lodge's refusal to serve him because he was a Negro and because of Moose Lodge's discriminatory membership and operating policies, Irvis brought this action under 42 U. S. C. § 1983 and invoked three-judge court jurisdiction under 28 U. S. C. § 1343(3) and § 2281.

It is undisputed that Irvis was subjected to an act of discrimination by Moose Lodge solely because he was a Negro. It is equally undisputed that this act of discrimination took place in connection with Moose Lodge's use of its state-granted liquor license and because of Moose Lodge's explicit exclusionary policies with respect to non-Caucasians. Irvis has alleged, and will discuss further in this part of the brief, that the granting of the liquor license to Moose Lodge and all of the Pennsylvania scheme of alcoholic beverage control was and is accomplished pursuant to a state-wide system of statutory origin and authority, thus requiring him necessarily to allege the unconstitutionality of the statute as applied and to request the convening of a three-judge court.

The allegations of the Complaint thus presented a case in which a Negro citizen of the United States was deprived of a right (not to be denied the equal protection of the laws) secured by the Constitution. This denial was caused

by Moose Lodge and the Board acting under color of the Liquor Code of Pennsylvania through the grant (by the Board) and use (by Moose Lodge) of a liquor license in conjunction with Moose Lodge's admitted racially discriminatory policies.

Whether "under color of any statute" (42 U. S. C. § 1983) or "under color of any State law, statute" (28 U. S. C. § 1343(3)) is taken to mean something different from "state action" or the same thing as "state action," the result is the same. As Moose Lodge has pointed out in its brief (pp. 33-34), the complaint stated a case cognizable under these provisions.

The "under color" language, it has been noted by the Court, has consistently been treated as meaning the same thing as "state action." *United States v. Price*, 383 U. S. 787 at 794 (n. 7). An indication that "under color of any statute" may have a narrower meaning appears in Justice Brennan's concurring opinion in *Adickes v. S. H. Kress and Company*, 398 U. S. 144 at 209-212; but even this reading of the phrase sustains federal jurisdiction here.

Justice Brennan notes (a) that Congress may protect Fourteenth Amendment rights against interference by private persons without regard to state involvement in the private interference,[6] 398 U. S. 144 at 209, and (b) that a private persons acts under color of a state statute when he "in some way acts consciously pursuant to some law that gives him aid, comfort, or incentive;" 398 U. S. 144 at 212, or when "the private discriminator consciously draws from a state statute any kind of support for his discrimination." 398 U. S. 144 at 212.

Clearly, even under this "narrower" view, the act of discrimination practiced by Moose Lodge was done under

6. *United States v. Guest*, 383 U. S. 745, which dealt with a criminal provision, 18 U. S. C. § 241, related to 42 U. S. C. § 1983.

color of the statute. Under the "state action" concept approved in *United States v. Price*, 383 U. S. 787 at 794, no other conclusion is possible. Several lower federal courts, in recent analogous situations, agree. See *Powe v. Miles*, 407 F. 2d 73 (2nd Cir. 1968), sustaining a cause of action under 42 U. S. C. § 1983 and jurisdiction under 28 U. S. C. § 1343(3) in part under "state action" principles and *Seidenberg v. McSorley's Old Ale House, Inc.*, 308 F. Supp. 1253 (S. D. N. Y. 1969) and 317 F. Supp. 593 (S. D. N. Y. 1970), similarly sustaining a cause of action and jurisdiction under these provisions in the sex discrimination context.

Passing, then, to the three-judge court request, Irvis can add little to the presentation in Moose Lodge's brief supporting the convening of the three-judge court. As pointed out there (pp. 35-37) all of the elements usually relied upon to defeat three-judge court jurisdiction are absent here, viz.:

1. Unconstitutional application of a statute to aid discrimination is properly alleged. Moose Lodge refers to this as negative discrimination; but by rephrasing the statement, it could as easily recognize the affirmative nature of the discrimination. That is, the Liquor Code requires the Board to issue and renew the license without considering Moose Lodge's racial discrimination, and Moose Lodge barred Irvis because of his race.

2. Injunctive relief is requested in conjunction with declaratory judgments.

3. Injunctive relief was granted, as required to sustain this Court's jurisdiction under 28 U. S. C. § 1253.

4. No issue of the Supremacy Clause is involved.

5. The unconstitutionality of the statute is directly put in issue by the complaint.

6. The statutory scheme involved is state-wide in effect and is administered by a Board of state officers having responsibility co-extensive with the scope of the Liquor Code.

7. The constitutional issue is not insubstantial.

Irvis agrees with Moose Lodge that the most recent decisions of this Court provide compelling support for three-judge court jurisdiction. In *Flast v. Cohen*, 392 U. S. 83, the convening of a three-judge court under the somewhat narrower scope of 28 U. S. C. § 2282 was upheld. There, complainants alleged, in part, that portions of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, 20 U. S. C. §§ 241(a) et seq., §§ 21 et seq., if read as authorizing expenditures for education in religious schools, were unconstitutional. The Solicitor General argued that no three-judge court should have been convened because (1) the complainants only sought to stop operation of specific programs in New York City and (2) the complainants questioned only the administration of the Act.

The Court unanimously upheld the convening of a three-judge court. It pointed out, first, that complainants' specific focus on programs in New York [like Irvis' specific focus on the actions of the Moose Lodge] only served to clarify the issues and did not limit the impact of the constitutional challenge which could involve relief extending to any similar program.

> "Therefore, even if the injunction which might issue in this case were narrower than that sought by appellants, we are satisfied that the legislative policy underlying § 2282 was served by the convening of a three-judge court, despite appellants' focus on New York City's programs." 392 U. S. 83 at 90.

Second, the Court held that the complaint against unauthorized administration of the statute did not vitiate the

effect of the contention that the Act itself was void, a contention which required determination by a three-judge court.

Turner v. Fouche, 396 U. S. 346, involved numerous attacks on three-judge court jurisdiction, all of which were rejected by the Court. For present purposes the important point is found in the third paragraph of footnote 10 of the Court's unanimous opinion. 396 U. S. 346 at 353. Here, the Court reaffirmed the long-sustained distinction between a request for injunctive relief on the ground of the unconstitutionality of a statute, "either on its face or as applied, which requires a three-judge court," and a similar request which only attacks the unconstitutionality of the result obtained by use of a statute not alleged to be unconstitutional, which does not require a three-judge court.

All grants of liquor licenses (including club licenses), all authority exercised by the Board, all controls placed upon alcoholic beverages in Pennsylvania flow from provisions of the Liquor Code. Thus, the Code states, § 104(c) (p. 12):

> "(c) Except as otherwise expressly provided, the purpose of this act is to prohibit the manufacture of and transactions in liquor, alcohol and malt or brewed beverages which take place in this Commonwealth, except by and under the control of the board as herein and specifically provided, and every section and provision of the act shall be construed accordingly. The provisions of this act dealing with the manufacture, importation, sale and disposition of liquor, alcohol and malt or brewed beverages within the Commonwealth through the instrumentality of the board and otherwise, provide the means by which such control shall be made effective . . ."

The authority of the state to exercise such full control is unquestioned and recognized. *Goesaert v. Cleary*, 335 U. S. 464, *Tahiti Bar, Inc., Liquor License Case*, 186 Pa. Super. 214, 142 A. 2d 491, affirmed, 395 Pa. 355, 150 A. 2d 112, appeal dismissed, 361 U. S. 85.

Section 207 (pp. 14-15) of the Liquor Code states in part:

> "Under this act, the board shall have the power and its duty shall be:
>
> * * *
>
> (b) To control the manufacture, possession, sale, consumption, importation, use, storage, transportation and delivery of liquor, alcohol and malt or brewed beverages in accordance with the provisions of this act . . .
>
> * * *
>
> (d) To grant, issue, suspend and revoke all licenses and permits authorized to be issued under the act and the regulations of the board . . .
>
> * * *
>
> (i) From time to time, to make such regulations not inconsistent with this act as it may deem necessary for the efficient administration of the act . . ."

Under § 401 (pp. 20-21) of the Liquor Code the Board is given authority, "subject to the provisions of this act and regulations promulgated under this act," to issue licenses to hotels, restaurants and clubs. The granting of liquor licenses is properly designated a matter subject to control of the legislature. *Spankard's Liquor License Case*, 138 Pa. Super. 251, 10 A. 2d 899.

The granting of licenses is conditioned by §§ 403 and 404 (pp. 21-24) of the Liquor Code. An applicant must

submit an application containing information required by the Board, a description of the premises for which a license is required and other information regarding the premises as the Board requires. The descriptive information must show any proposed alterations or construction. A corporate applicant must be a Pennsylvania corporation or a foreign corporation authorized to transact business in Pennsylvania; and its officers, directors, stockholders and manager must be citizens of the United States. A club applicant must submit a list of the names and addresses of its members, directors, officers, agents and employees along with any other information regarding club affairs as the Board requires. No license may be issued to a club if the operation of the licensed business would not inure to the benefit of the entire membership of the club. The applicant must be a person of good repute, and the issuance of the license must not be prohibited by any of the provisions of the Liquor Code.

A license may be refused if the place to be licensed is too close to a church, hospital, charitable institution, school or public playground or if it is a place where the principal business is the sale of liquid fuels and oil. A license shall be refused if it would be detrimental to the welfare, health, peace and morals of the inhabitants of the neighborhood within a radius of 500 feet of the licensed premises. A license may be refused to a corporation if any officer or director has been convicted of a felony within the five year period preceding the date of the application.

If all of these requirements and conditions (plus a few other formal ones) are met, the Board may issue a license to a club.

Renewals of licenses are governed by § 470(a) of the Liquor Code. Absent a club licensee's violation of the Liquor Code or the Board's regulations or unless the club's

premises fail to meet the requirements of the Liquor Code or the Board's regulations, this section requires renewal of the license. A licensee's racial discrimination is not a basis for refusing to renew its license.

It would seem undeniable under these circumstances that the application of a state statute—the Pennsylvania Liquor Code—is involved, that Irvis has necessarily placed its validity under the Fourteenth Amendment into question and, as Moose Lodge states in its brief (p. 38):

> ". . . The complaint stated a case that required a three-judge court; such a court was therefore properly convened (A. 9, 10); and its final judgment, which granted injunctive relief against state officers (para. 2 and 3; A. 41-42), was accordingly reviewable here by direct appeal pursuant to 28 U. S. C. § 1253 . . ."

B. A Substantial Case or Controversy Exists for Determination by Exercise of the Judicial Power.

Moose Lodge, in its brief (pp. 38-44), has raised a question not raised by it in its jurisdictional statement but one which may fairly be considered as within the scope of the Court's order postponing the question of jurisdiction to the hearing on the merits. As posed by Moose Lodge (Brief, p. 2), the question is "[w]hether the present cause still involves any case or controversy . . ." Moose Lodge concludes (Brief, p. 44), (1) that Irvis has suffered no personal injury for which he seeks redress but rather has "merely a general interest common to all members of the public" (citing *Ex Parte Levitt,* 302 U. S. 633 at 634) and (2) that Irvis' cause "involves only a 'difference or dispute of a hypothetical or abstract character'" (citing *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 240).

Moose Lodge's argument follows a certain course:

First, it agrees (Brief, p. 41) that Irvis properly stated a cause of action in his complaint. We take this to include agreement that the declaratory and injunctive relief requested by Irvis (A. 7-9) was equally proper and responsive to the deprivation incurred by him. In any event Moose Lodge never, before or now, has stated otherwise.

Second, it correctly notes (Brief, p. 42) that Irvis did not allege a personal desire to become a member of Moose Lodge. And it further correctly points out (Brief, p. 42) that Irvis, in his answer to Moose Lodge's motion to modify the decree of the court below, disclaimed any desire to prevent the members of the Moose Lodge from associating with whomever they wished and also rejected Moose Lodge's offer to amend its by-laws to eliminate any racial restrictions on the admission of guests (see A. 43).

Finally, Moose Lodge refers (Brief, pp. 43-44) to Irvis' statement in his Motion to Affirm that the constitutional right of the members of Moose Lodge to associate freely on a racially discriminatory basis does not include a concomitant right to obtain a liquor license as exhibiting Irvis' interest in obtaining only an "abstract and essentially legislative declaration" (Brief, p. 43).

From this, Moose Lodge concludes that Irvis has sought and received no personal redress (although what Irvis has sought has not changed at any time during the course of these proceedings) and, therefore, that no case or controversy now exists.

The exact objection of Moose Lodge is not easy to discern, but essentially it appears to fall within the context of the doctrine that the Court will not render an advisory opinion. *Muskrat v. United States,* 219 U. S. 346. This

follows from Moose Lodge's conclusion (Brief, p. 44) with respect to disputes of an abstract nature. And, although Moose Lodge appears to disclaim raising any issue of standing (Brief, p. 39), its conclusion (Brief, p. 44) with respect to Irvis' interest in the cause nevertheless appears to inject such an issue into its argument.

This is not a case, of course, in which Irvis asserts someone else's constitutional rights to vindicate his own position. Thus, he does not claim that the discrimination practiced here was directed at another whose cause he sought to advance. *Sullivan v. Little Hunting Park,* 396 U. S. 229.[7] Nor is he in the position of defending himself from paying damages on the ground that to require him to do so would in fact lend support to the discriminatory actions of others. *Barrows v. Jackson,* 346 U. S. 249. Nor does he allege an economic loss flowing directly from a statutory deprivation of the personal liberties of other individuals, *Pierce v. Society of the Sisters,* 268 U. S. 510.

Irvis is a Negro. He has been subjected to racial discrimination himself precisely and solely because he is a Negro. He need not rely, nor does he rely, on anyone else's injury as a result of Moose Lodge's actions. The constitutional deprivation suffered is his.

In addition, it is correct to note that Irvis has not brought a class or representative action in any traditional sense. That is, he has not alleged that he represents all Negroes in Pennsylvania (all of whom, obviously, would be similarly situated) and that all are deprived of their Fourteenth Amendment rights by the actions complained of. There is no need for such an assertion here. It is undeniable that all Pennsylvania Negroes are affected by Irvis' suit and benefit from it. And it is equally undeniable

7. Such a case might have been presented in the present context had Moose Lodge sought to expel its member who brought Mr. Irvis to the premises as his guest.

that Irvis has suffered discrimination because of his race and that all other Pennsylvania Negroes would have similarly suffered.

The Court has required much less in a class action context, entertaining suit even where the complainants have suffered no actual loss and could not point to anyone else who had suffered any actual loss. *Law Students Research Council v. Wadmond*, 401 U. S. 154. And in a non-class action in 1968 it struck down a 1928 state statute which had never been enforced by the state solely on the complaint of a person who feared her violation of the statute might cause her to lose her job. *Epperson v. Arkansas*, 393 U. S. 97.

But the Court has dealt with the issue raised by Moose Lodge, and it has disposed of it in a way which sustains Irvis' position. Although *Flast v. Cohen*, 392 U. S. 83, involved a particular application of these principles to the question of whether a taxpayer had sufficient standing to maintain a suit challenging certain expenditures of federal funds, it also represents a clear statement of the case-and-controversy doctrine or, as the Court described it, the concept of "justiciability," 392 U. S. 83, at 95.

It is the purpose of the doctrine to accomplish two things. First, it purports to limit the business of federal courts to issues "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." 392 U. S. 83 at 95. Second, it enforces the separation of powers within our government by assuring "that the federal courts will not intrude into areas committed to the other branches of government." 392 U. S. 83 at 95.

The former of these finds expression in conclusive statements [8] such as the court will not adjudicate a political

8. In the interest of brevity, this summary does not repeat the case citations found in *Flast v. Cohen*, 392 U. S. 83 at 95, n. 10 through n. 13, in support of each statement.

question or it will not render an advisory opinion or it will not act when a party has no standing to maintain the action. As the Court also points out, 392 U. S. 83 at 96, the rule against rendering an advisory opinion also reinforces the separation of powers principle because it also restricts the federal courts in their scope of review over actions of the federal legislative and executive branches of government. This expression by the Court concludes succinctly:

> "Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." 392 U. S. 83 at 97.

Turning from this question to the general problem of standing, the Court similarly set forth guideposts. The "fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated," 392 U. S. 83 at 99. The heart of the question is "whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions.' *Baker v. Carr*, 369 U. S. 186," 392 U. S. 83 at 99. In other words, standing raises the question of whether a complainant is a proper party to seek adjudication of an issue, not whether the issue is justiciable (e.g. a party may have standing, but the issue is a non-justiciable, political one).

In *Flast v. Cohen* itself the specific question of standing was resolved in favor of the taxpayers because the Court

found they had shown "the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements," 392 U. S. 83 at 102.

In light of these principles, what do we find in the present case. Irvis' injury was and is unquestioned: solely because of his race he was subjected to discriminatory action by Moose Lodge. This action was required by the express provisions of the Constitution of the Moose Lodge. The Moose Lodge is the possessor and user of a Pennsylvania club liquor license without which it would suffer in membership and functioning. As a private club, Moose Lodge, like a private person, may exhibit prejudice and bigotry; but it may not call upon the state to enforce or support its discriminatory acts. Therefore, it may not continue to possess and use the state-granted and regulated liquor license unless it is willing to forego its discriminatory practices and afford Irvis and others like Irvis the free opportunity to participate in the activities and benefits accruing from such possession and use *whether or not* Irvis and others like Irvis choose to take advantage of this opportunity. If it is not, its license should be terminated; and the Board should be enjoined from issuing licenses to private clubs which so discriminate.

Clearly, the injury suffered by Irvis was not just that a private organization barred him because he was black. This, it was entitled to do. The injury was that Irvis was discriminated against by a private club which had called upon the State to support its existence and functioning and, thus, to support its discrimination.[9] This cannot be done, and this is why the redress sought by Irvis was aimed at the

9. It is, in a strict sense, only incidental that the act of discrimination here occurred directly in connection with Moose Lodge's use of the liquor license since enjoyment of the license is inextricably tied to membership. It is doubtful if Moose Lodge could qualify for a license if it attempted to segregate its eating and drinking functions from its other activities.

Board primarily and at the Moose Lodge only indirectly. The specific allegations of Moose Lodge's discrimination primarily impart "specificity and focus to the issues in the lawsuit" and do not limit "the impact of the constitutional challenge made in this case." *Flast v. Cohen*, 392 U. S. 83 at 89.

Certainly, the concept of justiciability is served by this case. Irvis has been injured. He has been injured by a conjunction of actions taken by the Board and by Moose Lodge, his adversaries here. The case involves no separation of powers issue. Nor does it raise a political question or one that has become moot. The judicial process appropriately has been invoked by one who has been deprived of his constitutional rights to force a halt to further possible deprivations. Irvis' personal stake in this is not subject to question.

What does Moose Lodge say about this? It says first (Brief, pp. 42-43) the decree has given Irvis no redress for any injury suffered by him, that he has no more interest in this matter than the lawyer in *Ex Parte Levitt*, 302 U. S. 633, had in seeking Justice Black's removal from the bench—i.e. the same interest as the general public. Yet, it is Irvis himself who was discriminated against in fact. More importantly, it is Irvis himself (and all other Negro citizens of Pennsylvania) who has been and continues to be denied any opportunity to determine for himself if he wishes to seek to enjoy the benefits flowing to members of private clubs which possess and use liquor licenses. This foreclosing of any opportunity to become a member of a club which holds a license is itself sufficient injury to afford redress to Irvis. To hold otherwise would be similar to a holding that the convicted persons in the restaurant sit-in cases [10] could not challenge their convictions because they

10. *Peterson v. City of Greenville*, 373 U. S. 244; *Lombard v. Louisiana*, 373 U. S. 267; *Robinson v. Florida*, 378 U. S. 153.

did not insist that they wanted to return to eat at the very restaurants at which they had been arrested or to have denied relief to the ladies who sought to remove the male-only rule at McSorley's Old Ale House [11] because they did not insist that they intended to appear frequently for ale.[12]

Second, Moose Lodge says (Brief, p. 42) Irvis has refused to go along with a modification of the decree which "would make repetition impossible." This contention is based upon Moose Lodge's motion to modify the decree (A. 42-44) and somehow to allow it to change its operations and to permit Irvis to be brought to the Moose Lodge's premises as a guest. But, as Irvis pointed out in his answer to this motion (A. 44-47) nothing at all would be changed even if this were done because the vice of racial discrimination arose from the privileges of membership, either those accruing to a person in his own enjoyment of them or those accruing to a person in his ability to bring a guest or guests to Moose Lodge. Nothing in the suggested modification would make repetition impossible because the fact that Irvis was a guest was purely happenstance. Whether he be barred because no member would invite him or because he has no opportunity to become a member, the situation remains unchanged: The discrimination is not eliminated, nor is the state's support removed.

It is an odd fact, previously unknown to Irvis and revealed in Moose Lodge's brief (p. 10), that during the pendency of this action and prior to Moose Lodge's motion

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11. *Seidenberg v. McSorley's Old Ale House*, 308 F. Supp. 1253 (S. D. N. Y. 1969), 317 F. Supp. 593 (S. D. N. Y. 1970).

12. The distinction between the right to decide for oneself and the actual use of a facility is not only an important one here; it has practical significance. In fact, the ladies have made little use of McSorley's since their legal victory. See *New York Times*, June 27, 1971, § 1, at 48, col. 1: "'They were more concerned at the right to come in than actually coming in,' said Daniel O'Connell Kirwan, the manager of McSorley's, the city's oldest saloon."

to modify the decree, the General Laws of the Loyal Order of Moose regarding admission of non-members were amended. Section 92.1 [13] (appendix G to J. S., p. 72), as amended, further restricted the admission of guests to persons "who are eligible for membership in the fraternity" (Brief, p. 10, n.). This change would thus make it impossible for a member to bring Irvis as a guest to the premises of Moose Lodge and leads Irvis to wonder how the proposed modification would have accomplished even its limited goal.

Third, Moose Lodge says (Brief, pp. 42-43) the decree embodies "generalized and abstract constitutional theory." Irvis is not certain of the purpose of this objection in the context in which it appears. Nevertheless, it seems misplaced. The decree is intended specifically to redress the deprivation of rights involved here consistent with the scope of these rights. To have ordered Moose Lodge to admit Irvis to membership would have gone further than required. To have directed revocation of Moose Lodge's liquor license without offering Moose Lodge an opportunity to reacquire it on a basis consistent with constitutional requirements would have been punitive. Thus, the decree affords Irvis the requested redress for his injury without infringing on Moose Lodge's private club status.

How this careful delineation of rights and remedies has led Moose Lodge to find no adversariness in this proceeding thus remains unclear. In view of carefully explained principles set forth by this Court, Irvis is an injured party with a direct, personal stake in the judicial resolution of his complaint. His position is far different from that of just any member of the public; his cause is far from hypothetical or abstract.

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13. Prior § 92.1 is set forth on page 10 of Moose Lodge's Brief with the misprinted heading of § 91.1.

II. Pennsylvania, in Establishing an Alcoholic Beverage Control System Under Which It Grants a Liquor License to a Racially Discriminating Private Club Whose Possession and Use of That License Are Extensively Regulated by the State and Whose Purposes, Membership and Functions Are Materially Benefited by Its Possession and Use of the License, Has Become Involved in the Racial Discrimination Practiced by the Private Club to the Degree Condemned by the Fourteenth Amendment.

A. The Pennsylvania Alcoholic Beverage Control System Leads to Extensive and Significant Involvement of the State in the Affairs of Moose Lodge.

This case poses a now familiar dichotomy, state action v. no state action, with all of its attendant consequences on the decision of this Court. One writer [14] has characterized the "no state action" contention as the main support for the "maintenance of de facto racism" in our society and asserted the position that the guarantee of "equal protection" should mean that "members of a race are to be shielded in the most ample way from any incidence of governmental power that works their disadvantaging by virtue of their race . . ." Yet, no single such test has ever been promulgated by the Court. To the contrary, it has warned of the difficulties of doing so while simultaneously affirming the breadth of the Fourteenth Amendment's protections:

> Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms

14. Black, *Forward: "State Action," Equal Protection and California's Proposition 14, The Supreme Court, 1966 Term,* 81 Harv. L. Rev. 69 (1967) at 70-71.

> whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' . . . Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U. S. 715 at 722.

Nevertheless, the Court has not failed to lend guidance in this field. Early on, the Court held that purely private conduct, however discriminatory, was shielded from interference, that only where state action or support was present could redress be afforded, *Civil Rights Cases*, 109 U. S. 3. But, as that opinion equivocally states, the protections of the Fourteenth Amendment are aimed at "State action of every kind . . ." 109 U. S. 3 at 11. This broad conclusion has found its contemporary expression in *United States v. Guest*, 383 U. S. 745 at 755-56:

> "This is not to say, however, that the involvement of the State need be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation."

The Court has described the problem as posing "polar opposites, each of which is easily identified and resolved. On the one hand, the Fourteenth Amendment plainly prohibits a State itself from discriminating because of race.

On the other hand, § 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections." *Adickes v. S. H. Kress and Company*, 398 U. S. 144 at 161.

What, then, is present in the context of liquor licenses, private clubs and discrimination? Is it purely private conduct when a private club licensee discriminates, or is it action permeated with state support and involvement? The Alcoholic Beverage Control Commission of the Commonwealth of Massachusetts, in its recent (April 7, 1971) decision in proceedings involving the renewal and revocation of private club licenses in that Commonwealth, noted that discriminatory practices by fraternal organization licensees were found to "breed mistrust in government because of the belief that government condones and supports the open and notorious practice of discrimination by granting to these clubs a privilege in the form of a liquor license." In this light let us turn to the Pennsylvania alcoholic beverage control system and examine its nature and impact on its licensees.

1. *The extent of the involvement and regulation is unique and far-reaching.*

Pennsylvania is a "monopoly" state. That is, pursuant to its powers under the Twenty-first Amendment it has gathered unto itself the full measure of authority allowable in constructing a system of control over the manufacture, sale, use, transportation and disposition of alcoholic beverages, including the actual sale of liquor.[15] It does this

15. As expected, there are exceptions. Pennsylvania does not manufacture alcoholic beverages and it does permit distribution of malt and brewed beverage by licensed, private distributors.

through the mechanisms of several state statutes, primarily the "Liquor Code," which are printed as part of Appendix F to Moose Lodge's Jurisdictional Statement, the Board created by the Liquor Code and the Board's Regulations, also printed as part of Appendix F to the Jurisdictional Statement. Examination of each of these confirms the correctness of the characterization of the system as "pervasive" by the court below and the importance of this determination to its decision.

(a) *The Liquor Code and private clubs.*

Private clubs are simply one of three defined types of eligible applicants for what the Liquor Code terms a "retail liquor license" (Code, § 401, p. 20[16]). A license issued to a club is referred to as a "club liquor license" (Code, § 401, p. 20). Any licensee is entitled to purchase liquor from a Pennsylvania Liquor Store, to keep such liquor on its premises and to *sell* the liquor (and beer and ale purchased by it) to its guests, patrons and, in the case of clubs, members for consumption on the premises (Code, § 401, p. 20).

Licenses are renewed annually, and the Board divides the State into districts for the purpose of staggering the expiration dates (Code, § 402, p. 21, § 434(a), p. 41).

Every applicant for a license must apply in writing to the Board, pay an application fee and post a bond (Code, § 403(a), p. 21). Every application must describe the part of the premises (including the club's premises) for which the license is desired and any other information regarding the premises as the Board, by regulation, requires (Code, § 403(a), p. 21). This information must include any proposed alterations to the premises or any new construction contemplated (Code, § 403(a), p. 21). No business may be

16. We adhere to the system of referring to the pages of Appendix F to the Jurisdictional Statement.

transacted by a licensee until the Board has approved the actual alterations or construction as being in conformity with the application and has been satisfied that the establishment meets the definition of the licensee's status as defined by the Liquor Code—e.g. "club" (A. 15) (Code, § 403(a), pp. 21-22).

Applicants are either individuals, corporations or associations (Code, § 403(b); (c), (d) and (e), p. 22). No license may be issued to a club (unlike other applicants) if the operation of the business would not inure to the benefit of the entire membership of the club (Code, § 403(f), p. 22). Every club applicant (unlike other applicants) must file with its application a list of the names and addresses of all its members, directors, officers, agents and employees, together with their dates of admission, election or employment and any other information regarding club affairs as the Board requires (Code, § 403(e), p. 22).

If the Board receives the proper application, fees and bond, if the Board is satisfied the applicant is a person of good repute and that the premises are satisfactory and that the license is not prohibited otherwise by any provisions of the Liquor Code the Board may issue a club license (Code, § 404, p. 23). The Board has limited discretion to refuse any license application if the welfare, health, peace and morals of the inhabitants of the neighborhood would be affected (Code, § 404, p. 23); and it may refuse a license if the applicant or any officer, director or partner has been convicted of a felony within five years immediately preceding the date of the application (Code, § 404, p. 24). Whatever discretion the Board has in the case of club applicants must be exercised reasonably and within limits of the Liquor Code. *Appeal of Log Cabin Rod and Gun Club,* 66 Pa. D. & C. 188; *William E. Burrell, I. B. P. O. E. of W. 737 v. Pennsylvania Liquor Control Board,* 172 Pa. Super. 346, 94

A. 2d 110. Nothing in these limits allows the Board to consider any racial discrimination practiced by the applicant (A. 6, 25).

A club applicant pays an annual license fee of fifty dollars ($50.00) or the much higher fee of hotel and restaurant applicants if it has a catering license (Code, § 405(b), p. 25).

Every licensee including a club licensee may buy liquor at wholesale (Code, § 305(b), p. 18), and may sell alcoholic beverages by the glass, open bottle or other container and mixed for consumption only on the licensed premises and, in the case of clubs, only to members in the club (Code, § 406(a), p. 25). No club (unless it holds a catering license) may sell to anyone except a member (Code, § 406(a), p. 25). However, members of another club (e.g. a Moose Lodge in another state) chartered by the same state or national organization as the licensee are considered members of the licensee (Code, § 406(a), p. 25).

Hours of service of alcoholic beverages are restricted, much less so in the case of clubs, however. Hotel and restaurant licensees may sell (on any day except Sunday) from 7:00 A. M. until 2:00 A. M. of the following day and (on Sunday) from 12:00 midnight until 2:00 A. M. and from 1:00 P. M. until 10:00 P. M. (Code, § 406(a), p. 26, and as amended by Act No. 27 of the 1971 Session of the General Assembly, effective September 7, 1971). No hotel or restaurant licensee may sell on any election day from 2:00 A. M. until one hour after the polls close (Code, § 406(a), p. 26).

On the other hand, clubs may sell on any day, *including Sunday and election day*, except between the hours of 3:00 A. M. and 7:00 A. M. (Code, § 406(a), p. 26).

Various interlocking businesses are prohibited. Essentially, these prohibitions are designed to prevent manufacturers, importers and distributors from having any

financial interest in a retail licensee, holding a retail license, owning property used by a licensee or lending money to a licensee and to prevent licensees from owning property or lending money to a manufacturer, importer or distributor (Code, § 411, pp. 33-34).

The Liquor Code contains separate provisions regarding the application for and issuance of licenses to sell only malt and brewed beverages (e.g. beer and ale). The licenses are called retail dispenser's licenses (Code, § 432, p. 38). Thus, an applicant, including a club, may apply for a license which does not permit the sale by it of liquor.

Provisions affecting a retail dispenser's license are similar to those affecting a liquor license. An application is required (Code, § 432(a), p. 38). The Board must adhere to statutory limitations before issuing a license (Code, § 432(d), pp. 38-39; § 437, pp. 43-44). Licenses are issued for one year (Code, § 434(b), p. 41). The club retail dispenser's license fee is considerably lower than other retail dispenser's license fees (Code, § 439(d) and (e), p. 45). Clubs may sell only for consumption on the premises and only to members (Code, § 442(a), p. 46). Members of other lodges of the same state or national club have member privileges (Code, § 442(c), p. 47). Interlocking businesses are prohibited (Code, § 443, pp. 47-48).

The total number of licenses is limited. The maximum number of retail licenses which may be issued in any municipality is one for each 1,500 inhabitants (Code, § 461, p. 50). However, certain types of licenses are not counted in determining if the quota is filled. These include licenses granted to airport restaurants, municipal golf courses, hotels and clubs (Code, § 461, p. 50). If, on the other hand, the quota is filled, no new licenses except for hotels, municipal golf courses and airport restaurants may be granted (Code, § 461, pp. 50-51).

Thus, in a municipality of 30,000 inhabitants, 20 retail licenses is the maximum number which may be issued except to hotels, municipal golf courses and airport restaurants. If 20 licenses have been issued (not counting those issued to clubs), no new license may be issued, even to a club. If 20 have not been issued, new club licenses may be issued freely. This partial monopoly situation regarding club licenses effectively restricts the issuance of new licenses to clubs in urban areas since quotas have long been filled.

Licenses are not assignable (Code, § 468(a), p. 56); but the Board may permit transfers of licenses within the same municipality or, under limited circumstances, of a club or restaurant license to another municipality in the same county (Code, § 468(a), p. 56). No license may be transferred (or issued) for any premises where the sale of liquid fuels and oil is carried on as a business (Code, § 468(a), p. 57; § 404, p. 23).

Licenses are subject to renewal (Code, § 470(a), pp. 53-53.1). Unless the licensee has violated any of the liquor laws of Pennsylvania or the regulations of the Board or unless the licensee has become a person of "ill repute" or the premises fail to meet the requirements of the Liquor Code or of the Board's regulations, "the license of a licensee shall be renewed" (Code, § 470(a), p. 53.1).

Provision is made for fines and revocation or suspension of licenses if a licensee violates any of the laws pertaining to alcoholic beverages or taxes thereon (Code, § 471, pp. 59-60).

Despite all other provisions of the Liquor Code, no licenses may be issued in any municipality unless the electors therein approve the granting of licenses, including club licenses, generally (Code, § 472, pp. 61-62). The issue is determined by referendum pursuant to the election laws;

and if the vote is negative, the Board may not issue licenses in that municipality (Code, § 472, p. 62).

A very special provision exists regarding the issuance of club licenses where the club owns contiguous land in more than two municipalities, in at least one of which no licenses are allowed, and where at least one acre of the land is situated in each municipality where licenses are allowed. The Board may issue a license to the club under these circumstances (Code, § 472.1, pp. 62-63). No other type of licensee is affected.

All persons pecuniarily interested in any licensed business must file has name and address with the Board. This information is a public record (Code, § 473, p. 63).

A club licensee, unlike other licensees, may surrender its license to the Board if it has not been operating its premises; and the Board may hold this license for the club for up to two years without revocation (Code, § 474, p. 64).

The Code contains a veritable battery of prohibitions applicable to licensees; and, contrary to Moose Lodge's contention (Brief, p. 67), most of these mentioned by the court below apply to clubs as well as to other licensees.

Generally, the Liquor Code makes it unlawful for any person to sell liquor except in accordance with the statute or the Board's regulations (Code, § 491(1), p. 64) or to purchase, possess or transport liquor not acquired from a State Liquor Store (Code, § 491(2) and (3), pp. 64-65) and for any licensee to fail to break any empty liquor containers (Code, § 491(5), p. 65), to adulterate any liquor or refill any container (Code, § 491(10), p. 66) or to violate any regulations of the Board regarding sale of liquor (Code, § 491(13), p. 66). Similar restrictions apply to malt and brewed beverages and retail dispenser licensees (Code, § 492, pp. 66-69).

Certain unlawful acts apply to all licensees with specific exceptions. No licensee may serve an alcoholic beverage to a person who is intoxicated, insane, a minor or an habitual drunkard (Code, § 493(1), pp. 69-70). No licensee may extend credit to a purchaser except hotels to guests, clubs to members or, under limited circumstances, to holders of credit cards (Code, § 493(2), p. 70). Licensees may not peddle any alcoholic beverage (Code, § 493(4), p. 71), fail to have available any branded merchandise advertised as available by it (Code, § 493(5), p. 71) or give away any lunch to a customer (Code, § 493(9), p. 72).

Club licensees may have entertainment on the premises without a special permit from the Board, but other licensees may not do so without paying for and acquiring an amusement permit (Code, § 493(10), p. 71). However, no licensee, including a club licensee, may permit any "lewd, immoral or improper entertainment" in any licensed premises (Code, § 493(10), p. 72).

No servant, agent or employee, with limited exceptions, of a licensee may be employed elsewhere in the alcoholic beverage business (Code, § 493(11), p. 72).

All records regarding operation of the business must be kept on the premises for at least two years, and any agent of the Board must be given access thereto (Code, § 493(12), pp. 72-73).

No licensee may employ any minor (Code, § 493(13), p. 73) or allow any undesirable person or minor to frequent the premises (Code, § 493(14), p. 73).

No licensee may cash payroll, unemployment compensation or public assistance checks (Code, § 493(15), p. 73).

No licensee may display for passers-by any price at which it will sell any alcoholic beverage (Code, § 493(18), p. 73) or advertise on the outside of its premises any brand of alcoholic beverage (Code, § 493(19), p. 74) or advertise

inside his premises any brand of alcoholic beverage except in a way limited as to cost (Code, § 493(20), p. 74).

Nothing valuable may be given to any person by a licensee to induce purchases of alcoholic beverages from the donor by the employer or principal of the donee (Code, § 493(23), pp. 74-75). Nor may any licensee give or receive anything of value in connection with the purchase or sale of alcoholic beverages (Code, § 493(24), p. 75).

Restrictions are placed upon the employment of females (Code, § 493(25), p. 75). However, these restrictions do not appear to apply to clubs.

(b) *The Pennsylvania Liquor Control Board.*

The agency through which the Commonwealth of Pennsylvania conducts this state-operated, supported and regulated enterprise is the Board. There are three members who serve as officers and agents of the Commonwealth (Code, §§ 201 and 206, pp. 12 and 14).

As would be expected, the Board is given broad powers to act and to regulate. It has general power to control all aspects of the alcoholic beverage business (Code, § 207(b), p. 14), to deal with licenses and impose fines on licensees (Code, § 207(d), p. 14) and to make such regulations as it deems necessary for the administration of the Liquor Code (Code, § 207(i), p. 15). Such regulations are to have the force of law (Code, § 207(i), p. 15).

Specific regulatory authority is given to the Board to do various things, among which is to make regulations regarding "The issuance of licenses and permits and the conduct, management, sanitation and equipment of places licensed or included in permits." (Code, § 208(h), p. 16).

(c) *The Board's regulations and private clubs.*

Turning to the Regulations of the Pennsylvania Liquor Control Board (Appendix F to Jurisdictional Statement,

pp. 105-244.14), we find such a volume of material that it would be foolish to repeat it all here. However, certain regulatory provisions, some applicable only to clubs and some applicable both to clubs and other licensees, are worth special mention.

Regulation 105 (pp. 117-119) deals with wholesale liquor purchase permit cards and implements the privilege given to licensees under § 305 of the Liquor Code to purchase liquor at wholesale prices.

Regulations 106 and 107 (pp. 121-131) deal with restrictions placed upon the transportation of alcoholic beverages and the importation and distribution of malt or brewed beverages. Extensive record-keeping and reporting are required.

Regulation 109 (pp. 135-137) deals with the restrictions on employment of minors and criminals and outside employment of licensees. These restrictions far exceed those found in normal business situations.

Regulation 111 (pp. 143-144) contains detailed requirements regarding rest rooms in licensed premises, sanitation and lighting of licensed premises and equipment used in serving malt and brewed beverages.

Pursuant to the Liquor Code's restrictions on the unauthorized giving away of food, Regulation 112 (p. 145) allows the furnishing free only of peanuts, pretzels, popcorn and potato chips.

Regulation 113 (pp. 147-149) deals exclusively with clubs. It prescribes rules regarding the maintenance of detailed membership records, income and expenditure accounts, a bank account, a minute book and the keeping of the club charter, constitution, by-laws, invoices and other records. And, obviously reflecting the days of the speakeasy, no club may maintain any barricaded doors.

Regulation 114 (p. 151) requires every corporate licensee and all clubs to report all changes in officers and directors.

Regulation 116 (pp. 159-150) limits the sale of liquor held following the death or bankruptcy of a licensee or held otherwise by the law to the Board itself.

All licensee advertising efforts of any kind are subject to Regulation 122 (pp. 177-179). Board approval is required in most cases. Further detailed requirements regarding published advertising are contained in Regulation 149 (pp. 244.3-244.8) and Regulation 150 (pp. 244.9-244.14).

Under Regulation 127 (p. 189) all licensees, except club licensees, must furnish photographs of principal officers; and all licensees, including club licensees, must furnish photographs of managers and of the licensed premises.

Regulation 129 (pp. 193-202) prohibits "missionary" work among licensees by a vendor of liquor to the Board unless the vendor has registered with the Board.

The public posting of an application for a retail license, which clubs and other applicants must do, is governed by Regulation 136 (pp. 217-218).

Pursuant to Regulation 145 (p. 237) all applicants for a license (and all officers or directors or managers of corporate applicants) must furnish their fingerprints to the Board.

This lengthy recital of the statutory, administrative and regulatory system established and conducted by Pennsylvania has only one purpose. It amply illustrates the extent to which the State has exercised its powers of control over the alcoholic beverage business and has regulated the conduct and affairs of its licensees. This extensive licensing and regulatory authority is one reason which truly makes the system a unique one, unlike other instances of licensing frequently called upon to question the presence of state action. In Pennsylvania's alcoholic beverage control system every licensee has a "partner," the State, which participates daily in its affairs.

Compare this situation with the issuance of an automobile driver's license or a building permit. True it is that an applicant for a driver's license must meet and adhere to certain standards of driving in order to protect the public at large. And it is equally true that an applicant for a building permit must comply with certain structural and safety requirements required for the public safety. But the extent of the regulation in each case nowhere approaches the quantum of control and involvement that is present in Pennsylvania's alcoholic beverage control system; and in each case, unlike the purpose of the latter system, the regulation is imposed solely for protection of the public, not as well for the benefit of the licensee.

2. *The nature of the involvement and regulation supports and benefits the private club licensee and the State.*

Having discussed the extensive nature of the involvement and regulation by Pennsylvania of its licensees, we turn to what might be called the qualitative factors which enter into the relationship. These exhibit a number of unusual features.

Initially, we might recall that we confront an area of activity which stands alone in its implications for state control. The Twenty-first Amendment itself relegates to the states a broader measure of control over intoxicating liquors than over any other article of commerce. And it is generally accepted and recognized that the granting of a license to sell alcoholic beverages is a limited privilege *in fact* and may be terminated by the State—i.e. there is no constitutional right to engage in the business of selling alcoholic beverages. *In re Tahiti Bar, Inc.*, 395 Pa. 355, 150 A. 2d 112, appeal dismissed, 361 U. S. 85. It is the State which may decide the extent and manner in which the sale of intoxicating liquors may be conducted. *Cavanaugh v. Gelder*, 364 Pa. 361, 72 A. 2d 85, cert. denied, 340 U. S. 822.

Pennsylvania, therefore, has created its system. What does it mean to Moose Lodge?

(a) *Licenses are not freely available.*

We have referred already to two features of the Pennsylvania system which place limits on the availability of licenses and on the ease with which the public may obtain alcoholic beverages. One limitation arises from the local option provisions contained in § 472 of the Liquor Code (Appendix F, pp. 61-62). These provisions eliminate any possibility of a license being granted to any applicant for use at premises located in a Pennsylvania municipality which has not, by referendum, approved the granting of liquor licenses for the sale of liquor in the municipality.

A "municipality" is defined in the Liquor Code (§ 102, p. 10) as "any city, borough, incorporated town or township of this Commonwealth." Reference to Title 53 (Municipal Corporations) of the Pennsylvania Statutes Annotated will reveal that this enumeration covers all units of municipal government that exist in Pennsylvania. Consequently, the effect of § 472 of the Liquor Code is to create a state-wide local option scheme of partial prohibition. No one is precluded from purchasing liquor and consuming it in his home; but his access to "over-the-counter" sales in clubs, restaurants and hotels is limited. Thus, those private clubs which hold licenses in municipalities where approval has been given for the granting of licenses are advantaged not only by having a license but by having one which is not available elsewhere.

The second limitation arises from the application of the quota provisions of § 461 of the Liquor Code (p. 50). We already (pp. 49-50 above) have explained the unusual effect of the language of this section which serves to eliminate club licenses from the count but to include them in the prohibition against granting additional licenses once the quota

is filled. The effect on the value and importance of holding a club license, however, is the same: once a municipality's quota is filled, no new license may be issued to a club.

The meaning of this restriction on the number of available licenses is clear. It makes possession of a license by a private club more valuable than it would be were licenses freely available; and to the extent that the available licenses have been issued to racially discriminating private clubs such as Moose Lodge, it reduces the possibility that private club licenses will be available for nondiscriminating private clubs.[17] There is, therefore, a certain monopoly aspect to Pennsylvania's system of issuing liquor licenses; and the possession and use of such a license becomes accordingly more important and valuable.

(b) *Licensees purchase liquor at wholesale.*

The unlicensed individual who wishes to partake of alcoholic beverages in his home does so by purchasing liquor by the bottle. In Pennsylvania he can make this purchase only at a state-owned and operated Liquor Store. Liquor (and wine) is sold there at fixed prices reflecting the cost at which the Board purchases these items from its suppliers

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17. The importance of this factor cannot be ignored. In a feature story on private fraternal clubs appearing in The New York Times on November 16, 1970, p. 1, col. 8, the writer noted: "Being a member of the Elks or other fraternal organizations has long been considered a must by politicians in many areas, but there have been times in recent years when their refusal to admit blacks has been a sensitive issue for members who were candidates. And the Elks have shown no enthusiasm for changing their restrictions. Last summer at their convention in San Francisco, they voted overwhelmingly for the second time against a proposal that the racial bar be dropped." Earlier in the article the writer, in noting the growth in the membership roles of fraternal organizations, stated total membership in the Elks to be 1,508,050, in the Moose to be 1,137,948 and in the Eagles to be about 850,000. A news report in The New York Times of August 4, 1969, p. 17, col. 1, indicated that the Fraternal Order of Eagles had voted to keep their restrictive clause against non-white persons.

plus the markup which the Board fixes pursuant to its powers under § 207(b) of the Liquor Code (p. 14) plus the tax imposed by the Act of June 9, 1936, Pamphlet Laws 13, 47 Pa. Stat. Ann. §§ 794 to 796 plus the Pennsylvania Sales Tax imposed pursuant to §§ 201 and 2(j) of the Act of March 6, 1956, Pamphlet Laws 1228, as reenacted and amended prior to March 4, 1971, 72 Pa. Stat. Ann. §§ 3403-201 and 3404-2(j) and the Act of March 4, 1971, Act No. 2 of the 1971 Session of the General Assembly, §§ 202 and 201(k)(10), from March 4, 1971 and thereafter.

The licensee, club included, is in a different position. Pursuant to § 305(b) of the Liquor Code (p. 18) every Pennsylvania Liquor Store is to sell liquor "at wholesale" to licensees; and under this authority the Board has issued its Regulation 104 (pp. 117-119) to implement this right of a licensee to acquire liquor at wholesale prices. Therefore, the racially discriminating private club, like other licensees but not like unlicensed purchasers, may buy liquor at reduced prices and reap the benefit in additional income accruing to it from its subsequent sales.

(c) *Moose Lodge sells alcoholic beverages to its members.*

The unlicensed individual who purchases an alcoholic beverage (liquor or wine from a State Liquor Store, malt or brewed beverages from a distributor) does so usually for his own consumption or that of his friends; but in no event is he permitted to sell what he has purchased without violating §§ 491(1) and 492(2) and (3) (pp. 64, 66 and 67) of the Liquor Code.

This is in direct contrast to the position of a licensee. Under § 401 of the Liquor Code (p. 20) the authority given to a licensee is to sell liquor and malt and brewed beverages. In the case of a club licensee the authority given is to sell to members.

The club, therefore, is not just a convenient conduit for the purchase and consumption of alcoholic beverages by its members. It is engaged in an income-producing activity through its sales of these beverages to its members.

(d) *In its sales activity Moose Lodge is less restricted than other licensees.*

In addition to the advantages already mentioned, Moose Lodge (and other private clubs) enjoys an advantage not given even to other licenses. Section 406(a) of the Liquor Code (p. 26) generally restricts hours of sale in two ways. First, it limits sales by non-club licensees on weekdays to the hours between 7:00 A. M. and 2:00 A. M. of the following day and on Sundays to the hours between 12:00 midnight and 2:00 A. M. and 1:00 P. M. and 10:00 P. M. In addition, prior to September 7, 1971, Sunday sales outside of Philadelphia and Pittsburgh (Pennsylvania's only first class city and second class city respectively, see § 1 of the Act of June 25, 1895, Pamphlet Laws 275, as amended, 53 Pa. Stat. Ann. § 101) were totally outlawed. Second, the Sunday sales authority given to non-club licensees is restricted to those who do a substantial part of ther business in food sales (§ 406(f)[18] of the Liquor Code, p. 28, and Regulation 141.01 and 141.02, p. 229).

The only hours restriction placed on club licensees is that they may not sell between the hours of 3:00 A. M. and 7:00 A. M. (Liquor Code, § 406(a), p. 26). Thus, a club may sell liquor and malt and brewed beverages seven days a week, twenty hours a day. The second restriction regarding food sales does not apply to a club at all. Thus, a club need not be concerned with making substantial sales of food before it can sell alcoholic beverages to its members. It can

18. Act No. 27 of the 1971 Session of the Pennsylvania General Assembly moved the food requirement into subsection (a) of § 406 and places the percentage at forty percent.

carry on its income-producing sales with considerably more freedom and benefit than can other licensees.

(e) *To Moose Lodge the possession and use of a liquor license is of financial value and significantly contributes to its continued existence and operation.*

We already have seen that a private club which possesses and uses a liquor license in Pennsylvania holds something which (i) is not available everywhere, (ii) is not freely available even where permitted, (iii) permits it to purchase liquor at a wholesale price, (iv) permits it to realize income from the sale of alcoholic beverages during hours when no one else is allowed to sell them and without restriction as to accompanying food sales.

What this means to Moose Lodge is not difficult to determine. It is demonstrated in several ways in the record in this case.

First, it is demonstrated in Moose Lodge's admission (A. 25) to the averment in paragraph 4 of the Complaint (A. 4) that "The receipt and ownership of such a [liquor] license is a valuable privilege granted to a club by the Commonwealth of Pennsylvania through Defendant Board." Despite Moose Lodge's effort (Brief, p. 25) to avoid the implications of this admission and to characterize it as a "relationship" which is a "matter of law rather than of fact," it is clear that the averment and the admission do not seek to establish any legal relationship at all. Rather, their clear purpose is to indicate as a matter of fact that what the Board has granted Moose Lodge is valuable and is a benefit not freely available to all.

Second, confirming this fact, Moose Lodge itself made two averments in its answer which Irvis has admitted are true (A. 19, 20, 25). The first of these states that if Moose Lodge were denied its right to obtain a liquor license, "it would be greatly impeded in that it would sustain a loss of

membership and its capability of carrying on its benevolent purposes would be seriously impaired." The second, in a similar vein, states that if Moose Lodge were denied a liquor license or the right to obtain one, it "would be greatly impeded in that it would sustain a great loss in membership and its capability of contributing to the purposes of the Supreme Lodge would be seriously impaired."

Irvis takes these statements at face value. Fairly read, they indicate that because of its possession and use of a liquor license Moose Lodge is able to attract and keep its membership and to provide support for its stated fraternal and charitable purposes. Without a liquor license it would lose both members and money. Members would be lost because their interest in Moose Lodge would wane without the availability of alcoholic beverages. Money would be lost because the decrease in membership would cause a loss in dues and a loss in receipts from the sale of alcoholic beverages. In short, the liquor license has become an organizational and financial mainstay to Moose Lodge.

An important aspect of this situation is that these benefits flow directly from the possession and use of the license, not from activities of Moose Lodge carried on independently of this possession and use and to which the license is only an incidental contributor. This significant fact distinguishes this license from the vehicle operator's license of a traveling salesman or the building permit issued to a business enterprise. In these latter cases the license itself confers no direct financial or other support for the possessor and user. Support there flows only from the independent efforts of the possessor. A liquor license is truly unique in this respect.

(f) *A direct financial return flows to the State treasury.*

In this discussion we have not emphasized the other side of the picture, that which reveals the mutuality of the

benefits conferred. While the analogy to the biological state of symbosis invoked in Irvis' Motion to Affirm (p. 5) may be overly picturesque, it nevertheless aptly portrays the relationship between State and licensee. The advantages to Moose Lodge we have seen. The advantage to the State is obvious for through the purchase of liquor from the State a licensee contributes both profit and tax[19] to the State Treasury. No breakdown of the amounts contributed by clubs or other licensees is available, but among the papers in the record here and certified to the Court by Moose Lodge is a comparative operating statement of the Board (Request for Certification of Record, Item 10, No. 3, Exhibit "A") from 1933-34 through 1968-69. The figures are impressive.

During that 36 year period the Board realized a total of $7,841,718,290.46 in sales receipts and taxes. It turned over to the Commonwealth's general fund $2,143,222,838.08 in profit and taxes. For the 1968-69 year alone the Board took in $423,594,088.29 in sales receipts and taxes and contributed $134,911,137.59 to the general revenues of the State. By any standard these are significant amounts and amply illustrate the importance of Pennsylvania's system of control to the welfare of the State.

All of these factors converge toward one conclusion: Pennsylvania's system of licensing and regulation under the Liquor Code and related statutes goes far beyond any routine form of licensing. In the field of alcoholic beverage control the system produces major and indispensable support for a club licensee's financial and organizational stability and reciprocal financial benefits to the State.

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19. We do not dwell upon the financial return from license fees paid to the Board since these are returned to the various municipalities in Pennsylvania where the paying licensees are located (Liquor Code, § 801, p. 97). However, these, too, constitute a contribution to government and should be mentioned.

B. Pennsylvania's Involvement Is So Significant That Moose Lodge's Racial Discrimination Constitutes State Action in Violation of the Fourteenth Amendment.

We have seen, thus far, that Pennsylvania's alcoholic beverage control system is, as the court below characterized it, pervasive in the scope and extent of its regulation of licensees. We also have seen that the system is one which confers substantial benefits on Moose Lodge and the State.

These factors make the system unique in the general field of licensing and set it apart from the other types of licenses mentioned by Moose Lodge in its Brief (p. 64). Licenses whose general purposes are to assure adherence to defined standards of health and/or safety, licenses whose general purposes are to assist in the maintenance of a system of public information and record and licenses whose general purposes are to provide evidence of business or professional qualifications all stand on a different footing from the liquor license in both of these characteristics and cannot be equated with it for purposes of determining the presence or absence of state action.

The issue is further complicated by the labeling process. "Licensing," as we have just noted, involves a great variety of situations, all quite different in effect and purpose and in the relationship created between the licensing state and the so-called licensee. Therefore, attempts to reach conclusions by forcing all "licensing" into a single mold usually point to the easily determined case (e.g. automobile driver's license, elevator inspection certificates, marriage license) and fail to recognize the differences presented by the liquor license.

How useless this generalized labeling process can become is further seen if the various attributes and indicia of Pennsylvania's liquor license, previously described, are

recalled. In the context of a business activity which private parties cannot enter as a matter of right, *Crowley v. Christensen,* 137 U. S. 86, and of the economic benefits which flow to the recipient of the license, to say no more of the extensive regulatory process, this so-called "license" really bears little resemblance to "licenses" in the generalized sense just mentioned. It is more like a franchise to do business and to reap the rewards therefrom, subject to State control. Thus, the liquor license deserves to be and should be considered in light of its own intrinsic attributes if a meaningful decision is to be reached in this case.

It is Irvis' belief that this approach is what the Court has suggested when, in *Burton v. Wilmington Parking Authority,* 365 U. S. 715, it said (at 722) ". . . to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." and when, in *Reitman v. Mulkey,* 387 U. S. 369 at 378, it repeated those words.

It also is Irvis' belief that the only truly relevant inquiry is the one which focuses on what the State has done or is being asked to do, not on how or when or where the act of discrimination occurs. That is, the racial discrimination practiced by Moose Lodge is tinged with state action because of the involvement or support or encouragement or command of the State, not because the act does or does not occur in a public setting, as Moose Lodge argues (Brief, pp. 60-62).

To support this position, we turn to the cases. No single case is exactly like this one, and few are like each other. But all are relevant to the inquiry posed and all provide insight into the problem.

1. *The presence of state action is revealed by the extent and nature of what the State has done.*

Although they arose in a context totally unlike the present one, the triumvirate of sit-in cases of 1963 and 1964 present a good starting point. *Peterson v. City of Greenville*, 373 U. S. 244, *Lombard v. Louisiana*, 373 U. S. 267, and *Robinson v. Florida*, 378 U. S. 153, all involved convictions for trespass after petitioners had refused to leave segregated eating facilities; and in all the discrimination occurred when petitioners were denied service (not when the States' judicial authorities were exerted to enforce their respective trespass laws). The point of variation in each was the nature of the State's involvement, and it was on this factor that the opinions dwelt.

In *Peterson* the State's involvement took the form of a local ordinance requiring proprietors of restaurants to segregate the races. The simple existence of the ordinance with its attendant official command of racial discrimination, apart from any showing that the discriminating party was motivated by the command, was sufficient to make the private discrimination state action.

In *Lombard* the State's involvement took the form of public statements by local officials condemning sit-ins and promising enforcement of the trespass laws. Nothing in the statements themselves was discriminatory. Nor did they command that discrimination be practiced although racial segregation was the rule in the local restaurants. The statements themselves, in the context of the private discrimination, were sufficient to invest the latter with state action.

In *Robinson* no State command or policy of restaurant segregation was present. The only State involvement was a State regulation requiring separate toilet facilities for the races. This alone was held to be sufficient State involvement to make the private discrimination state action. Fairly

stated, *Robinson* stands for the view that State discouragement of private integration lends the requisite state action to the discriminatory act.

All three of these cases, removed as they may be from the factual context of Moose Lodge's discrimination and Pennsylvania's grant of a liquor license, illustrate, first, that the element of private discrimination in these cases is a fixed factor, second, that the involvement of the State need not be the motivation behind the private discrimination and, in fact, may be unrelated to the specific act of discrimination itself and, third, that the variable in each case—what the State has done—is the proper subject of inquiry. If the State has commanded the private discrimination, state action is present. If the State has evidenced support for private discrimination against a backdrop of private discrimination, state action is present If the State encourages private discrimination or discourages integration, state action is present.

We take these illustrations to mean that neither the reason for the discrimination nor the indirect nature of the State's involvement is a critical factor. If the State has done something (or has refrained from doing something) which supports or encourages the private party in its discriminatory actions, the private discrimination becomes state action.

If we examine other cases, more like the present one in their factual contents, we come to the same conclusions.

In *Burton v. Wilmington Parking Authority*, 365 U. S. 715, the Court was faced with a private restauranteur's refusal to serve a Negro customer. The restaurant was located in a parking building owned and operated by the Wilmington Parking Authority, a state agency, which had leased part of the building to the owner of the restaurant. The lease was unexceptional in its provisions; but, as the

Court noted, it "contains no requirement that [the] restaurant services be made available to the general public on a nondiscriminatory basis . . ." 365 U. S. 715 at 720.

The Court found state action in the private act of discrimination. It did so because it found present a lease of public property to a private person for private business use, because the relationship between lessor (Parking Authority) and lessee (restaurant owner) "confers on each an incidental variety of mutual benefits," 365 U. S. 715 at 724, and because the Parking Authority carried on a number of activities with respect to the building. The Court noted, as well, that it could not ignore "especially in view of Eagle's [the restaurant's] affirmative allegation that for it to serve Negroes would injure its business; that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." 365 U. S. 715 at 724.

By adding all of these factors, the Court found "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." 365 U. S. 715 at 724. In short, the Court made a searching inquiry into what the State of Delaware, acting through the Parking Authority, had done and was doing and what this meant to the relationship between it and the private discriminating party.

It is a small step, if one at all, from *Burton* to this case. In *Burton* the State leased premises to the private party and assisted the latter in carrying on its business. Here, the State grants a liquor license to the private party and assists the latter in carrying on its functions. In *Burton* the relationship between the State and the private party was mutually beneficial. Here, as previously shown, the relationship between State and Moose Lodge is mutually beneficial. In *Burton* the State carried on certain respon-

sibilities with respect to the building. Here, the State carries on an extensive regulatory function in connection with the licensing process. Finally, in *Burton,* the profits earned and enhanced by private discrimination helped support the Parking Authority. Here, the moneys realized by Moose Lodge serve to increase Pennsylvania's general funds.

The Court's final characterization of what *Burton* involved is particularly appropriate here and bears repeating in full.

> "But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith . . . . By its action the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U. S. 715 at 725.

Can less be said here where Pennsylvania, speaking through the Liquor Code and acting in conformity thereto through its Board, has placed itself behind Moose Lodge's racial discrimination and thus become a "joint participant" in this discrimination? Can Pennsylvania really say it plays no role in the challenged action when the Liquor Code says it must give and renew a liquor license to Moose Lodge despite the latter's obvious racial barriers? Is Pennsylvania truly a neutral party which provides no support for invidi-

ous discrimination? Irvis believes these questions answer themselves in view of the nature and extent of Pennsylvania's involvement.

Reitman v. Mulkey, 387 U. S. 369, teaches a similar lesson. California had, by referendum, added to its Constitution a provision forbidding the State (or local subdivision) from limiting the right of a person to refuse to sell or rent his property to whomever he chooses. The Court, quite correctly, described the result as more than creating "an existing policy of neutrality with respect to private discriminations," 387 U. S. 369 at 376, but rather as one which not only freed private housing discrimination from existing statutory prohibitions but also positively supported a private right to discriminate.

The Court conceded that none of its earlier decisions "squarely controls the case we now have before us," 387 U. S. 369 at 380; but it found support for its decision holding the California provision invalid in several of them. One, *McCabe v. Atchison, Topeka & Santa Fe R. Co.,* 235 U. S. 151, is of particular interest.

McCabe involved an Oklahoma statute which authorized railway companies to haul sleeping and dining and chair cars reserved exclusively for whites, on the one hand, or Negroes, on the other. The Court said such a statute was invalid because it permitted the private carrier to deny equal service to Negroes. The *Reitman* majority described this conclusion as "nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of that case." 387 U. S. 369 at 379.

McCabe and the other cases, said the *Reitman* Court, "exemplify the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discrimi-

nations." 387 U. S. 369 at 381. In so viewing the California provision, the Court concluded:

> "Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 2b was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned." 387 U. S. 369 at 380-81.

Compare this with the present case. There is only one point of difference and it is one without consequence here. What the California constitutional provision says explicitly—the State may not forbid private discrimination in the housing market—the Pennsylvania statute says without the specific words—the Board may not forbid private discrimination by its club licensees or refuse to issue or renew a club license on the ground of racial discrimination. Through its alcoholic beverage control system, therefore, Pennsylvania involves itself in and encourages private discriminations.

Irvis takes *Reitman* to mean that while a State, if otherwise uninvolved, may choose not to abandon its uninvolved or neutral position in the face of racial discrimination, it cannot, if involved, refuse to act against discrimination or encourage it by its own position. *Burton*, in denying the State's right to "abdicate its responsibilities" by ignoring or failing to discharge them, says exactly the same thing; and we deem this rule effectively to forbid Pennsylvania from doing so here.

In one way, moreover, what the State does here goes even further in its support of discrimination than what California attempted to do in *Reitman.* There, what the State said to private persons was something like this: "Go ahead and discriminate; you are free from interference from the State." Here, the State does more. It says to Moose Lodge: "Go ahead and discriminate; you are not only free from interference from the State, you also are financially supported in your activities by the possession and use of a liquor license granted by the State." The State, in short, not only encourages discrimination by its negative proscription of State interference; it supports discrimination by conferring the liquor license on Moose Lodge.

In the discussion thus far, we have emphasized, as indicated, the role of the State in the context of the situation presented because we believe this is what the prior cases have done. In both *Burton* and *Reitman,* as well as in the sit-in cases, the position of the State in support of private discrimination appears. Elsewhere, as well, the Court has addressed itself to the import of regulation as state action.

Although far removed from the area of racial discrimination and actually involving federal, rather than state, action, *Public Utilities Commission of the District of Columbia v. Pollak,* 343 U. S. 451, bears directly on the issues of what constitutes state action and how the State's action is crucial to the decision.

Capital Transit Company (District of Columbia) placed loudspeakers in its buses. Through these loudspeakers it received and amplified radio programs. It received permission to continue this service after an investigation and hearings were conducted by the District's Public Utilities Commission. Passengers objected to the practice and brought suit.

The Court held that Capital Transit's actions in installing and operating the radio receivers involved the Government (here, Federal) to the degree that Constitutional requirements (here the First and Fifth Amendments) applied. Its language is directly relevant to the present case.

> "These amendments concededly apply to and restrict only the Federal Government and not private persons . . . .
>
> We find in the reasoning of the court below a sufficiently close relation between the Federal Government and the radio service to make it necessary for us to consider those Amendments. In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely on the fact that, by reason of such federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that the agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby.
>
> We, therefore, find it appropriate to examine into what restriction, if any, the First and Fifth Amendments place upon the Federal Government under the facts of this case, assuming that the action of Capital

> Transit in operating the radio service, together with the action of the Commission in permitting such operation, amounts to sufficient Federal Government action to make the First and Fifth Amendments applicable thereto." 343 U. S. 451 at 462-63.

We take this language to apply equally to a State government under the Fourteenth Amendment, and we read it to indicate that extensive state regulatory authority provides sufficient state involvement in the affairs of the regulated party to make the latter's actions those of the State. The comparative regulatory authorities of Pennsylvania's Public Utility Commission and its Liquor Control Board, moreover, are not so different as to call for a different conclusion on this ground.

It is true, of course, that in *Pollak* the Court went on to find no violation by Capital Transit of Pollak's First and Fifth Amendment rights in its broadcasting of the radio programs. Here, however, Moose Lodge has discriminated against Irvis solely on racial grounds and thereby unquestionably violated his Fourteenth Amendment rights. The importance of *Pollak,* as in the other cited cases, lies in its emphasis in inquiring into the role of the government to determine if state or federal action has occurred.

Two lower court cases point the same way; one is quite similar to the present case. *Seidenberg v. McSorley's Old Ale House, Inc.,* 317 F. Supp. 593 (S. D. N. Y. 1970), struck a blow for women's liberation by holding that McSorley's retention of a "men only" policy denied equal protection to women in violation of the Fourteenth Amendment.[20] Many

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20. No statutory argument was involved because the Civil Rights Act of 1964 applied neither to discrimination on account of sex nor to taverns engaged principally in selling alcoholic beverages rather than food.

of the same issues raised here were discussed there, and the court there concentrated its inquiry into the nature of the New York alcoholic beverage control system. It found, as did the court below here, a "pervasive regulatory scheme" (317 F. Supp. 593 at 602) and concluded:

> "When a state licenses such an enterprise, in an area peculiarly subject to state regulation, pursuant to a statute imposing pervasive controls upon the conduct of the business, and under circumstances in which state licensing practices endow the license with a certain franchise value as well, the state's involvement in the operation of defendant's business, and hence by implication in the exclusionary practice under attack, rises to the level of significance within the meaning of *Burton* . . ." 317 F. Supp. 593 at 604-05.

Finding state action in these factors and finding no rational basis for the exclusion of women, the Court ruled that McSorley's must open its doors to the gentle sex.[21]

In *Simkins v. Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963), cert. denied, 376 U. S. 938, Negro professionals sought to require several private non-profit hospital corporations to afford them staff privileges on a non-discriminatory basis. They prevailed because the court found sufficient state involvement through the receipt and use of Hill-Burton funds by the hospitals to provide the requisite state action and because racial discrimination was

21. Judge Mansfield also noted that McSorley's was a commercial enterprise open to the public, but primarily relied on this to bolster his distinction between a liquor license and licenses granted to private persons on a comparatively unregulated basis, not to support any distinction between McSorley's license and a liquor license granted to a private club. However, the form of his conclusion, opening McSorley's to women customers rather than stripping McSorley's of its liquor license, appropriately gives significance to the distinction between a "public" licensee and a "private" one, as discussed further in part III A of this Brief.

proved. Here, once again, the major inquiry dwelt on the nature of the state's involvement.

We conclude this part of our argument with reference to a recent decision of the Court. On June 28, 1971, the Court handed down its decision in *Lemon v. Kurtzman*, 91 S. Ct. 2105, declaring state aid to certain elementary and secondary schools in Rhode Island and Pennsylvania unconstitutional. It did so because in each case it found "that the cumulative impact of the entire relationship arising under the statutes in each state involves excessive entanglement between Government and religion" in violation of the constitutional prohibition against the establishment of religion. 91 S. Ct. 2105 at 2112. These decisions should be contrasted with that in *Walz v. Tax Commission*, 397 U. S. 294, where the Court sustained a grant of tax exemption by the state to a religious body, noting that this served to reduce entanglements.

Factually, it is a substantial step from a State Liquor Control Board's grant of a liquor license to a private club pursuant to the State Liquor Code to a State Department of Public Instruction's use of public funds to "purchase" education services from parochial schools pursuant to state statute; but the legal step is not all that far. "Excessive entanglement" is not too different, if it be different at all, from "substantial involvement" or "support;" and all certainly differ in nature and extent from a single act of granting tax exemption. We suggest that this same scrutiny into the "cumulative impact" of what Pennsylvania has done in its alcoholic beverage control system leads directly to the conclusion that state action is present in Moose Lodge's acts of racial discrimination.

By granting a liquor license to this private club without regard to its invidious racial discrimination, in thereby giving something to Moose Lodge not freely available to everyone everywhere, in permitting Moose Lodge to sell alcoholic

beverages to its members, in allowing Moose Lodge to sell alcoholic beverages at times forbidden to other license holders, in extensively regulating all aspects of Moose Lodge's possession and use of the license and, above all, in engaging with Moose Lodge in a mutually beneficial (and especially so to Moose Lodge) relationship, Pennsylvania has become involved in the private racial discrimination of Moose Lodge to that "significant extent" condemned by *Burton v. Wilmington Parking Authority*, 365 U. S. 175 at 722, and *Reitman v. Mulkey*, 387 U. S. 369 at 838.

2. *The private club character of Moose Lodge does not preclude a determination that state action is present in Moose Lodge's racial discrimination.*

It is stipulated here (A. 23-24) that Moose Lodge is a private organization. Its functions take place in a privately-owned building; its activities do not involve any public functions. We assume, of course, that it properly received a building permit when it constructed its home and that its restaurant facilities meet the necessary sanitary requirements of the City of Harrisburg.

Moose Lodge considers this public aspect vs. private character dichotomy a critical one in its favor. It points to the fact that a public building was involved in *Burton*, a public function was being performed in *Pollak*, public funds were used in *Simkins* and public assistance was sought in the sit-in cases. It concludes that none of these attributes are present here. The analysis is deficient in two respects.

First, as we have just seen, the cases are almost totally devoid of reliance on the "public" characterization to support a finding of state action. Instead, the focus is almost totally on the extent and nature of the State's support, involvement or encouragement of the private discrimination.

Second, the public versus private label does not contribute to a solution in these cases because it so easily

creates confusion. What is the "public" touchstone in any case if one be sought? In *Burton* was it the public building, part of which was leased to the private restaurant; was it the fact that a private restaurant ostensibly served the public; or was it really that public support was lent to private discrimination? In *Pollak* was it the performance of a public franchise service by a private corporation; was it simply private enterprise serving the public; or was it really, again, public involvement in the private function? And in *Reitman* or *Shelley v. Kraemer*, 334 U. S. 1, where purely private housing discrimination was involved, what public aspects were attached to the private party?

In every case the difficulty is clear and reaffirms the principle that the only importance of the "public" description is in regarding the State's participation in the matter. Suppose, to illustrate further, Pennsylvania, instead of granting a liquor license to Moose Lodge, leased a State-owned building to it. Moose Lodge would still be a private club, and undoubtedly it still would claim the freedom to discriminate. Would its private nature protect it from application of *Burton*?

Or suppose Pennsylvania enacted an amendment to its State Constitution forbidding the State or any local political subdivision from passing any law or ordinance limiting the right of a private club to deny membership to any person on account of race. Would this affirmative sanction of private discrimination be any of the less invalid under *Reitman* simply because private club membership was the issue?

One last example. Suppose, instead of granting Moose Lodge a liquor license, Pennsylvania simply appropriated $50,000 a year to it. Would this direct allocation of public funds represent a difference in legal consequence from the grant of the financially supportive liquor

license? Does it makes any difference that Moose Lodge is a private club in either instance?

We submit the answers are obvious. The private nature of Moose Lodge is not the pivotal factor any more than is a labeling of some aspect of the situation as "public". Were Pennsylvania to eliminate all of its regulation of the liquor business and were it to issue licenses freely to all applicants, without restriction as to locale and number, but by statute could only issue the licenses to applicants which served only whites on the one hand, or only non-whites, on the other, would the fact that Moose Lodge operated from privately-owned premises, performed no public functions and received no direct allocation of public funds entitle it to receive a liquor license under these conditions? Irvis suggests not—and for only one reason. Because *what the State would thereby do* would support racial discrimination by private licensees.

Such rejection of explicit reliance on the public aspect of the activity in which the discrimination took place appears in the Court of Appeals decision in *Commonwealth v. Brown*, 392 F. 2d 120 (3rd Cir. 1968), cert. denied, 391 U. S. 921. In this, the second Girard College case, the District Court, 270 F. Supp. 482 (E. D. Pa.) had relied on the fact that Girard College was performing an educational function to sustain its decision requiring admission of non-whites. The Court of Appeals disavowed such reliance. Instead, it found state action not in the function Girard College was performing but in the appointive and supervisory role of the State probate court (i.e. in what the State was doing).

This, Irvis submits, is the proper approach. It avoids the pitfalls inherent in Moose Lodge's position, and it adheres to the decisional guidelines laid down by the Court.

C. The Distinction Made by the Court Below Between a Racially Discriminating Private Fraternal Organization and Private Organizations Which Limit Participation on the Basis of Shared Religious Affiliation or a Mutual Heritage in National Origin Is a Sound One If the Limitation Is Reasonably Related to the Otherwise Valid Purposes of the Organization.

In its opinion (A. 40) the court below drew a distinction between private clubs such as Moose Lodge and those which limit participation to persons of a "shared religious affiliation or a mutual heritage in national origin." In its Brief (pp. 77-83) Moose Lodge refers to this distinction as involving an "egregious error." While we do not agree with the breadth of the language used by the court below, we believe that the distinction which it attempted to draw has a valid basis in law.

The statement made by the court below in its opinion undoubtedly was drawn from discussion engaged in between it and counsel at both of the oral arguments before it. The discussion began with a reference to the irrationality of the exclusionary practices engaged in by Moose Lodge in light of its stated purposes; and since this irrationality is at the heart of the position taken by Irvis on this question, it might be well to refer once again to the objects and purposes of Moose Lodge.

These appear on p. 22 of the appendix. Without repeating them in full, we can confidently state that they represent purposes almost exclusively fraternal in import. They clearly do not represent any purpose based upon a common religious bond or a common heritage in national origin. But, participation in these purposes is limited to "white persons."

We begin with a question. What is there about objects and purposes of a fraternal nature which call for

them to be limited to white persons? Is there some rational connection between limiting membership to white persons and carrying out fraternal purposes? We believe it is the element of rational connection between the limitation and the purposes which must be investigated in every instance, which is totally lacking in Moose Lodge's case and which the court below was attempting to indicate was present in other organizations.

We are dealing with discrimination. Discrimination, as such, means nothing. It is "invidious discrimination" which is condemned, and our inquiry is "whether the State has significantly involved itself with invidious discriminations." *Reitman v. Mulkey,* 387 U. S. 369 at 380. We suggest that the idea of irrationality is intimately entwined with the concept of invidious discrimination. Hence, in the case of Moose Lodge, we discern no rational connection between the purposes of the organization and its membership limitation to white persons; and, thus, we must condemn its limitation as involving invidious racial discrimination.

There is one other element of the inquiry. The Court has indicated its special concern for discriminations based on racial grounds. To this end, the court below cited (A. 40) the language of *Loving v. Virginia,* 388 U. S. 1 at 10, where the Court said: "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the states." This is not an isolated statement. In *Hunter v. Erickson,* 393 U. S. 385 at 391-92, the Court said: ". . . racial classifications are 'constiutionally suspect,' . . . and subject to the 'most rigid scrutiny,' . . . They 'bear a far heavier burden of justification' than other classifications . . . ." These cases are not offered to support a distinction between discrimination on racial grounds and discrimination on religious or ethnic grounds, as Moose Lodge

indicates (Brief, p. 77). These cases simply say that, where racial classification or discrimination is found, it will be scrutinized more closely and will be viewed with greater suspicion than will the classifications or discriminations based on other criteria.

We already have seen that on absolute grounds Moose Lodge's discriminatory classification fails the test. With or without rigid scrutiny, its limitation of membership to white persons, in light of its stated objects and purposes, is invidious. When we turn to other organizations, similar judgments cannot be made easily or lightly.

Moose Lodge has cited numerous organizations which limit their membership, some on religious grounds, some on political grounds, and some on grounds of ethnic heritage. We do not propose to examine each of these organizations. We do suggest, however, that the standard which must be applied to determine whether or not the limitations on membership of each of these organizations is or is not an invidious one is the same in every case. It may be phrased thusly: Viewing a racial limitation as particularly suspect, is the membership limitation reasonably related to the actual objects and purposes of the organization.

In this standard there are three elements. One is the already mentioned lesson of *Loving* and *Hunter* that racial classifications are especially suspect. The second is the already mentioned principle that the limitation must be reasonably related to the purposes of the organization. The third is embodied in use of the word "actual." In this we suggest that there must always be present a determination that the purposes and objects of the organization are stated and followed in good faith. If the element of good faith is lacking, then an apparent reasonable relationship between limitation and purposes cannot stand. We perceive no difficulty in administering this proposition for the court has already shown that it can penetrate the "sham" club. *Daniel v. Paul*, 395 U. S. 298.

We do not hesitate to advance this proposition despite Moose Lodge's expression of doubt (Brief, pp. 81-82). The fact that one's heritage is European and that European heritage may be limited to a particular racial type is not of itself sufficient to support a finding of invidious discrimination in a limitation based upon a particular European heritage. If the limitation is a reasonable one in light of the objects and purposes of the organization and if the objects and purposes, as well as the limitation, meet the test of good faith, then there is no reason, as Irvis sees it, for a finding that the discrimination is "invidious."

To illustrate this approach, we select one of the many organizations listed by Moose Lodge: The National Capital Democratic Club (of Washington). We do not know what the stated objects and purposes of this organization are, but we shall assume that they are to further the political fortunes and governmental principles of the Democratic party and that membership is limited to members of the Democratic party. If these assumptions are correct, then the membership limitation is a perfectly reasonable one; and the exclusion of members of other political parties cannot be considered improper. However, if we go further and assume that the membership is limited not just to members of the Democratic party but to white members of the Democratic party (or, as an alternative, Catholic members of the Democratic party), then the exclusionary provision bears no relationship to the objects and purposes of furthering the fortunes and principles of the Democratic party; and the limitation must be considered invidious.

We can reverse the view which we take of this exclusionary concept. Rather than regarding a limitation as discriminating against certain groups or persons, we can consider a valid limitation as, in fact, rationally establishing a common positive bond among persons who have a common goal which is furthered by the common membership

bond. In this sense the limitation is not exclusionary or discriminatory in any invidious way; rather, it contributes to and supports the valid purposes of the organization. When tested in this fashion, as well, Moose Lodge fails.

Moose Lodge has cited (Brief, p. 79) *Schware v. Board of Bar Examiners*, 353 U. S. 232 at 238-239, in support of its position. However, we read this case as supporting, in fact, exactly the position we have set forth in this statement of the situation. When the court said ". . . but any qualification must have a rational connection with the applicant's fitness or capacity . . .", it establishes the same basis for testing a discriminatory provision as Irvis advances here. That is, any provision of any kind which seeks to classify persons, or to exclude some while including others, is not necessarily bad; it is bad only if the exclusion has no "rational connection" with the purpose of the classification. When the court went on to say ". . . an applicant could not be excluded [from the practice of law] merely because he was a Republican or a Negro or a member of a particular church . . . .", it gave voice to the same test which Irvis advances here. We conceive that the Court has set no different standard.

The court below was too abrupt in its expression of this position. We do not support this expression absent the qualifications expressed in this discussion. However, what we suggest is that there is a line which can be drawn and that this Court has shown itself capable and skilled in so doing. Adherence to the tests of rationality and good faith to determine whether or not a particular discrimination is invidious will assure that what Moose Lodge (Brief, p. 82) fears—". . . the destruction of the great majority of private clubs in the entire nation . . ."—will not happen. Only those whose discrimination is invidious and who have called upon the State to support them in their discrimination will be affected.

III. The Decree of the District Court Was Appropriate and Proper and Gave Effect to the Constitutional Considerations Involved Here.

In his complaint, Irvis sought a decree from the court below that those provisions of the Pennsylvania Liquor Code which authorized and required the issuance and renewal of a club liquor license to Moose Lodge be declared in violation of the Fourteenth Amendment, that the Pennsylvania Liquor Control Board be enjoined from issuing or renewing a club liquor license to or for Moose Lodge (as well as ordered to revoke its existing license) and that the Board be ordered to adopt regulations embodying the position that no license will hereafter be issued or renewed to a private club which discriminates on the basis of race or color. The court below did not go so far as to adopt all of these requests. Rather, it limited its decree to ordering the termination and cancellation of the license of Moose Lodge and to enjoining the Board from issuing any license to Moose Lodge as long as the Lodge continued its policy of racial discrimination. By so doing, it limited the immediate effect of its decision to the case which was actually before it and thereby dealt not inappropriately with the evidence which had been presented to it by the parties. Nevertheless, its decree is of state-wide importance to the administration of Pennsylvania's liquor laws.

Moose Lodge has argued not only that the decree, even if based upon valid constitutional considerations, goes too far (Brief, pp. 83-86), but also that the decree is invalid because it infringes upon basic constitutional rights of Moose Lodge and its members (Brief, pp. 45-59). These arguments, however, fail to give proper consideration, in the first instance, to the extent of the constitutional violation found to exist by the court below and, in the second instance, to the proper nature and effect of the constitutional

right of private association. In fashioning its decree, the court below gave effect to both of these considerations.

A. The Presence of State Action in Moose Lodge's Racial Discrimination Requires Severance of the Relationship Between the State and Moose Lodge.

Once having determined that there was state action in the racially discriminatory acts of Moose Lodge, the court below was confronted with the problem of fashioning an appropriate decree to enforce its decision. In this respect it faced the same problem as did the district court in *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F. Supp. 593 (S. D. N. Y. 1970). The *Seidenberg* court, faced with a public tavern, where no private rights intruded, determined that the proper relief was to require McSorley's to open its doors to women. Here, the District Court, recognizing that Moose Lodge, as the parties had stipulated, was in fact a private organization, drew a line which gave effect to that aspect of the case and at the same time met the inevitable demand of its determination that state action was present.

Thus, rather than seeking an absolute end to the private discrimination, the District Court sought an end to the presence of the state action. This severance of the relationship between the state and Moose Lodge without impinging upon Moose Lodge's right to discriminate was the only logical approach to take.

1. *Termination and cancellation of Moose Lodge's liquor license subject to reissue if it reverses its policy of racial discrimination appropriately effects this severance.*

In its decree the lower court accomplished two things. First, it directed the Board to "terminate and cancel" the club liquor license issued by it to Moose Lodge. Second, it

directed the Board not to issue a club liquor license to Moose Lodge as long as the Lodge continued its policy of racial discrimination. While the Pennsylvania Liquor Code is not a model of clarity in this respect, it is Irvis' belief that use of the words "terminate and cancel" is meant to reflect a certain action short of "revocation" and that, by so doing, the court below placed the parties in a position where the statutory requirements accompanying a revocation would not apply.

Section 471 of the Liquor Code (appendix F, page 59) confers power upon the Board to suspend or revoke licenses. This lengthy provision contains, among other language, the following:

> "Any licensee whose license is revoked shall be ineligible to have a license under this act until the expiration of three years from the date such license was revoked. In the event the Board shall revoke a license, no license shall be granted for the premises or transferred to the premises in which the said license was conducted for a period of at least one year after the date of the revocation of the license conducted in the said premises, except in cases where the licensee or a member of his immediate family is not the owner of the premises, in which case the Board may, in its discretion, issue or transfer a license within the said year."

In the context of a private club license, this language clearly prevents the licensee from obtaining a new license for at least a period of three years following the revocation.

On the other hand, the Code contains no specific language regarding the meaning and effect of the words "terminate and cancel." However, by analogy to the situation described in Section 468(b) of the Code (appen-

dix F, p. 57) which deals with the disposition of a license when the licensee becomes insolvent, etc., and which states in such case that the license shall immediately "terminate and be cancelled" we find authority for the view that no time limit is set upon the possibility of having a license reissued for the premises if the Board so determines. Again, in the regulations of the Board, regulation 115, section 115.13 (appendix F, p. 156) where the Board deals with the situation in which a licensee obtains a different type of license to cover the same premises for which he already holds a license, the language states that the old license "must be surrendered to the Board for cancellation . . . ."

We have in these two examples indications that there is a procedure for removing a license from a licensee which does not involve the sanctions attendant upon a revocation. It is reasonable to apply this procedure in the present case because, first, revocation is a penalty prescribed for violations of certain provisions of the Liquor Code, something which is not involved here, and, second, because the demands of this case only require that the relationship between the Board and Moose Lodge be severed subject to the possibility of being renewed if Moose Lodge wishes to change its discriminatory policies.

This is what the decree of the court below appropriately accomplishes. By effecting a termination and cancellation of Moose Lodge's liquor license, it avoids the effects of a revocation; it avoids any implication that Moose Lodge has engaged in a violation of the Liquor Code itself; it places the license in a position to be reissued promptly to the same licensee for the same premises; it effects the necessary severance of the relationship between the Board and Moose Lodge in order to eliminate State action from Moose Lodge's racial discrimination;

it does not force the members of Moose Lodge to give up any constitutional right they might have of private association; and it leaves to the members of Moose Lodge themselves the final decision as to whether they wish to regain the liquor license for the club. In all respects, therefore, it would seem that the court below followed a position best calculated to accomplish the necessary severance without unduly penalizing Moose Lodge.

2. *A decree enjoining the Liquor Control Board from enforcing its regulation 113.09 would not afford proper relief for the Constitutional violation present here.*

It is an odd feature of this case that a point not mentioned by either party was raised by the court below in its opinion to support the decision it had already reached regarding the presence of state action in Moose Lodge's discriminatory policies. Regulation 113, section 113.09, of the Board's regulations states: "Every club licensee shall adhere to all of the provisions of its Constitution and By-Laws." The court below referred to this section of the regulations as indicating the State's direction that Moose Lodge must follow the discriminatory provisions of its own Constitution and By-Laws.

While a fair reading of the opinion of the court below indicates that the court would have reached the same decision regardless of the presence of this provision of the regulations, Moose Lodge argues (Brief, p. 85) that the court below erred in two respects in its treatment of this issue. First, its contends that the purpose of the regulation is to give effect to the Constitutionally protected rights of "privacy and of association" that are involved in the existence of a private club. This position, however, is contrary to what Moose Lodge has already indicated to be the purpose of this section of the regulation—an indication

of purpose with which Irvis, in fact, agrees. As Moose Lodge states on page 84 of its Brief, the purpose of this provision "is purely and simply and plainly the prevention of subterfuge." It goes on to point out that there are several problems attendant upon the existance and operation of a private club with which the Liquor Code is properly concerned. One of these is the concern that the private club be in fact a "private" licensee and not a place open to the public, in view of the special privileges given to private clubs (particularly with respect to hours of sale). The second of these concerns, closely allied to the first, is that the private club truly be a membership organization and not a "one-man club" devote to the generation of profit for a single individual or several individuals. Section 113.09 of the regulations is one of several ways in which the Board seeks to meet these problems; it has no other purpose. For this reason Irvis did not argue that this regulation acts as a direction to a private club to discriminate, and he does not agree with the indication of the court below to this effect.

Second, Moose Lodge contends (Brief, p. 85) that the decree of the lower court should have been fashioned simply to enjoin enforcement of this regulation to the extent that it "purports to implement discriminatory qualifications for membership . . ." In this way, says Moose Lodge, the State would not be in the position of supporting any restrictive membership provision. We take this position of Moose Lodge to mean that it believes the only proper decree which should have been entered by the court below was a decree which simply enjoined the Board from enforcing this regulation to the extent indicated.

This contention of Moose Lodge would be acceptable if, and only if, the court below had based its decision simply on the view that Regulation § 113.09 constituted a State

direction to discriminate. This, however, is a palpably incorrect reading of the decision of the court below. That decision was based upon the extensive regulatory authority exercised by the Board over its licensees and upon the benefits flowing to the licensee from the possession and use of the liquor license. The reference to section 113.09 of the regulations was not necessary to the decision, and a decree which does no more than enjoin the Board from enforcing this provision would do nothing towards effecting the severance of the state action from the racial discrimination found to be present here. If the Board were enjoined only from enforcing this provision, there would still remain the extensive regulatory authority exercised by it over its licensees; and there would still remain the substantial economic benefits enjoined by Moose Lodge from its possession and use of the liquor license, as well as the economic benefit flowing to the Commonwealth of Pennsylvania through the purchases and license fees contributed by Moose Lodge. In short, all of the elements upon which this case is based, elements which the court below found determinative to its finding of state action in the discrimination of Moose Lodge, would remain intact; and the decree would be totally ineffective.

We suggest a counter-proposal. We suggest, simply, that another paragraph should have been *added to the decree which was* actually entered. This paragraph would read as follows:

> "Defendants, the Pennsylvania Liquor Control Board, its members, William Z. Scott, Chairman, Edwin Winter and George R. Bortz, and their successors, are hereby permanently enjoined and restrained from enforcing section 113.09 of regulation 113 of the Pennsylvania Liquor Control Board to the extent that regulation has the effect of requiring any private club retail liquor

licensee to adhere to any racially discriminatory provisions of its Constitution and By-Laws."

The addition of such a paragraph to the decree would have the effect of removing any problem with respect to the impact of section 113.09, would leave the section intact with respect to all matters not involving racial discrimination and, at the same time, would appropriately not interfere with the required severance of relationship between the State and Moose Lodge as long as the latter followed its policy of racial discrimination. Therefore, even if some action with respect to section 113.09 is considered necessary or desirable, certainly no more than this is required.

B. No Constitutionally Protected Right of Private Association Is Impinged Upon by the Termination of Moose Lodge's Liquor License.

In presenting its argument with respect to the right of private association protected by the Constitution (Brief, pp. 45-59), Moose Lodge has submitted a tripartite argument. First, it contends that the constitutional right of privacy and private association applies to membership in a private club. Second, it states that Moose Lodge is a private club. Third, it argues that to deprive Moose Lodge of a State license "because its members exercise their constitutional rights of privacy" (Brief, p. 55) would violate the constitutional rights of the members of Moose Lodge.

We set aside the second of these points since it is a stipulated fact that Moose Lodge is a private club (A. 23). Moreover, we agree with the basic application of the first of these points as it has been expressed in the two cases cited by Moose Lodge (Brief, pp. 45-46), *Bell v. Maryland*, 378 U. S. 226 at 313 and *Evans v. Newton*, 382 U. S. 296 at 298-99. We agree with this right of private association because this right is encompassed in the constitutionally

protected right to freedom of assembly. We agree with it notwithstanding its reflection of an aspect of human nature which debases our national purpose, thwarts full participation of all our citizens in our national life and furthers a sense of inferiority among those excluded.[22]

But, we do not agree that the right of private association asserted here by Moose Lodge includes within its scope the right to retain its liquor license in the face of its racial discrimination or that, assuming for the moment that there is some fragment of such a subordinate right present here, it is unduly infringed upon when balanced against the racial discrimination practiced by Moose Lodge.

1. *The right of an individual to select his own associates in accordance with his own likes and dislikes and to join whatever group he chooses does not include a right to compel the State to grant his group a license to sell alcoholic beverages to its members.*

Proper consideration of the right to private association requires consideration of the nature of the right and what it protects. In *Bates v. Little Rock*, 361 U. S. 516 at 528, the writers of the concurring opinion note that among those rights protected by the First and Fourteenth Amendments, "one of those rights, freedom of assembly, includes of course freedom of association . . . . ." Thus, what confronts us here is an aspect of that right to congregate freely with whatever associates one chooses. The Court has been vigilant in sustaining that right, but nothing it has said in

22. Baltzell makes the following point about exclusionary club admission policies: ". . . in contrast to the dominant majority of Anglo-Saxon Protestants who dismiss the matter as a 'private and personal problem,' the members of minority groups are keenly sensitive to institutionalized exclusion of members of their own groups regardless of their merits and manners." Baltzell, E. Digby, *The Protestant Establishment—Aristocracy & Caste in America* (New York, 1964) p. 368.

doing so applies to the situation presented here. Without exception, application of the right of private association has been sustained to protect a free expression of political beliefs and interests, not to support the right of a private group to realize economic benefits through the sale of alcoholic beverages to its members (see Brief of Moose Lodge, p. 56).

Thus, in *N. A. A. C. P. v. Alabama*, 357 U. S. 449, the Court was confronted with an attempt by the State to compel a private organization to produce its membership lists. The Court stated its concern:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U. S. 449 at 460-61.

In the context of the case before it, the Court stated ". . . Compelled disclosure of affiliation with groups engaged in advocacy" may restrain freedom of association and, further, "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." 357 U. S. 449 at 462. Having

thus delineated the scope of the right of private association, the Court went on to balance the requirements of this right with the interest of the state in compelling disclosure of membership by the organization and found that the state had no such controlling justification for its interest that would override the right of association.

The court has never deviated from this approach. In *Bates v. Little Rock*, 361 U. S. 516, the court dealt with a municipal license tax ordinance requiring the submission of membership lists. Upon objection of a private organization, the court stated "And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States." 361 U. S. 516 at 523. Once again, the Court found no overriding state interest in requiring the disclosure of membership in the context of collecting a local tax which would override the protected right of private association.

In *Williams v. Rhodes*, 393 U. S. 23, certain restrictive provisions of Ohio's election laws were challenged. The court pointed out that ". . . the right of indivíduals to associate for the advancement of political beliefs . . ." is included in the First Amendment's protection of freedom of association. 393 U. S. 23 at 30.

No other case, including *Gibson v. Florida Legislative Investigation Committee*, 372 U. S. 539, has viewed the right of private association in any different light. Protection of the right to band together for the advancement of jointly-held beliefs and ideas lies at the core of the protected right. The extent of the protection may be broad indeed (including the rights to engage in political advocacy, union organization, and lobbying, see discussion in *N. A. A. C. P. v. Button*, 371 U. S. 415 at 416); but it has

never been extended to protect the right of a private organization to retain a liquor license granted to it by the state.

Possession and use of a liquor license does not result in the advancement of protected ideas and beliefs. It is, purely and simply, a grant by the state of something economically beneficial to the recipient. That it is to be granted at all is something within the determination of the state, and we consider it unarguable that Pennsylvania could amend its Liquor Code to provide that no liquor licenses should be granted to private clubs at all.[23] If it did so, exactly the same consequences would follow for Moose Lodge; but no right of private association would be infringed. True it may be that Moose Lodge may "sustain a loss of membership and its capability of carrying on its benevolent purposes would be seriously impaired" and true it may be that Moose Lodge's "capability of contributing to the purposes of the Supreme Lodge would be seriously impaired." But these would not follow as a result of the State's refusal to grant a liquor license; they would follow from the voluntary decision of the members of the Moose Lodge that their right of private association in furtherance of its benevolent purposes and the purposes of the Supreme Lodge was not really so important to them. In essence, the members are saying that they do not value the purposes behind a right to private association as much as they value the right to obtain alcoholic beverages.

No more is present here. The pleasure of obtaining a drink at the club bar may indeed be a valuable pleasure to the member and a matter of economic necessity to the club. It may even be that without its liquor license Moose Lodge may find itself in financial difficulty, and its mem-

23. By withdrawing all club licenses the State would simply place itself in a neutral position. See *Evans v. Abney*, 396 U. S. 435.

bers may find the club not as attractive as they did when liquor was available at the premises. But the right of the members to assemble together for the expression of ideas and beliefs is not prohibited or thwarted by anything the state has done; it is impeded, as stated above, only by the members' individual decisions not to participate. We submit that extension of the principles announced in the cases upholding the rights of members of the N. A. A. C. P. and other organizations (none of which, to Irvis' knowledge, held liquor licenses granted by the state or, indeed, asserted any right to obtain or hold such a license) to associate for the advancement of their ideas and beliefs is unwarranted.

Protection of the associational rights of individuals in order to advance mutually-held rights and ideas which the state may seek to suppress, either directly or indirectly, has been granted by this court in a variety of situations, as noted above. Never, however, has this court gone as far as it is being asked to go here. Given the reason for the right of private association and the scope which has been afforded it by the decisions of the Court, we find no invasion of this right by the withholding or withdrawal of a state-granted liquor license.

2. *Even if such a right might be deemed to include the right to possess and use a liquor license, it must give way when balanced against Irvis' right to be free from State-supported racial discrimination.*

Assuming for the moment, however, that there does exist within the scope of the right of private association some subsidiary element which protects Moose Lodge in the possession and use of its liquor license, the essential facts remain that it practices racial discrimination and receives the support of the State in doing so. The issue then be-

comes one of balancing the right of Moose Lodge to retain the license against the right of Irvis not to be discriminated against in a way which has the support of the State. This is the approach which the Court has followed in all of the above-cited cases involving the right of private association, for in each case it has balanced the right of the organization to be free from harassment against the right of the State to inquire legitimately into the affairs of the organization. We consider this approach a valid one, notwithstanding the fact that we do not have here a balancing of group versus state, but rather a balancing of group versus individual.

How, then, should this balancing be accomplished in any given situation? We suggest the following approach as a valid one. Where the right of private association is asserted by members of a group seeking to advance ideas and beliefs flowing from their exercise of the right of free speech and the right of free assembly (e.g., political advocacy), then the protection afforded them through granting primacy to the freedom of private association should be recognized; and possible discriminatory consequences flowing from the granting of this protection should be endured. On the other hand, where the right of private association is asserted in order to advance common social or fraternal interests, it should not be given precedence over racially discriminatory actions taken in furtherance of such common interests. We believe this approach would give adequate protection to the competing rights involved and afford proper deference to the statement of principles set forth in *N. A. A. C. P. v. Alabama*, 357 U. S. 449 at 460-61, quoted above (p. 94).

If this approach is a sound one, its application to the present case inevitably leads to subordinating any right enjoyed by members of the Moose Lodge to associate together in social and fraternal activities to the right of Irvis

not to be subjected to discrimination because he is a Negro. We believe this approach is sound, does give proper effect to whatever competing constitutional considerations are involved here and should be adopted by the Court if it finds any validity to the claim made by Moose Lodge in this respect.

Finally, we offer one more factor which bears upon this balancing process. Without denying the right of individuals to associate freely with whomever they please and to enjoy privacy within the confines of their private clubs, we suggest that the analogy between private club and private home drawn by Moose Lodge in its reference (Brief, p. 48) to *Griswold v. Connecticut*, 381 U. S. 479, is a doubtful one. It becomes even more doubtful when the private club is a large one, national in scope, like the Moose. The values attendant upon preservation of privacy in the home simply do not apply to the situation involved in an organization like Moose Lodge. In this we agree with the statement of Justice Harlan, dissenting in *Poe v. Ullman*, 367 U. S. 497 at 551-52:

> "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."

Can the same be said of the relationship between individual member and Moose Lodge? We believe that to ask the question answers it.

IV. This Case Is Not Affected by Congressional Passage of the Civil Rights Act of 1964 Providing in Title II for Injunctive Relief Against Discrimination in Places of Public Accommodation and Excepting Private Clubs.

In passing the Civil Rights Act of 1964 Congress responded to a Presidential call for civil rights legislation and produced an Act dealing with a number of areas in which discrimination prevailed. One of these areas was concerned with eliminating barriers to equal access to places of public accommodation, and Congress' determination of what to do and how far it should go in so doing is embodied in Title II of the Act. One limitation it did make explicit was contained in § 201(e) which provided an exemption for private clubs.

Other limitations also exist with respect to Title II. It neither purports to be nor is a legislative enactment fully exercising Congress' powers with respect to the matters dealt with; nor is it a Congressional expression of constitutional line-drawing between rights of privacy and private association, on the one hand, and the right to be free from discriminatory state action, on the other. The specific exception for private clubs can best be understood simply as expressing Congress' view that application of the provisions and remedies of Title II of the Civil Rights Act of 1964 was not there appropriate and that discriminatory actions by private clubs are to be redressed by other means.

We believe the history of the Act, as reflected in executive comment, legislative discussion and judicial review, support these conclusions and that determination of the present case depends upon resolution of the matters previously discussed.

A. The Legislative History and Judicial Treatment of Title II Support the Conclusions That No Constitutional Limits Were Drawn by Congress in Excepting Private Clubs From Its Coverage and That Private Racial Discrimination Constituting State Action Remains Subject to Redress as It Did Prior to Passage of Title II.

No review of Title II is complete which fails to consider all aspects of its enactment and review as well as the bases for Congressional authority to proceed. We say "bases" because, contrary to the statement in Moose Lodge's brief (p. 86) that the Civil Rights Act of 1964 was "a measure passed to enforce the Fourteenth Amendment," it is quite clear that another purpose existed with respect to Title II and that this other purpose was not only paramount but provides a key to the extent of the power exercised by Congress in passing Title II. We turn, first, to the history of Title II and then to its scope and application.

1. *President Kennedy's message.*

President Kennedy's message to Congress in June, 1963, requesting enactment of civil rights legislation is printed as House of Representatives Document 124, 88th Congress, 1st Session. It contains (pp. 3-5) a lengthy plea for passage of legislation providing for equal accommodations in public facilities. It contains not a word about private clubs.

Near the end of this section, however, President Kennedy clearly expressed the dual Constitutional foundation on which his recommendations rested:

> "Clearly the Federal Government has both the power and the obligation to eliminate these discriminatory practices: first, because they adversely affect the

national economy and the flow of interstate commerce; and secondly, because Congress has been specifically empowered under the 14th Amendment to enact legislation making certain that no State law permits or sanctions the unequal protection or treatment of any of its citizens." (H. R. Doc. 124, 88th Cong., 1st Sess., p. 5).

2. *Congressional response.*

H. R. 7152 was introduced in the House to implement the President's proposals and was referred to the Judiciary Committee. A Subcommittee (known as Subcommittee No. 5) of the Judiciary Committee held hearings on the bill. Among those testifying was the Attorney General who stated that Title II was based "primarily" on the Commerce Clause and also on the Fourteenth Amendment. Hearings before Subcommittee No. 5, House Judiciary Committee, 88th Cong., 1st Sess., 1375-1376, 1388, 139[illegible] 1410, 1417-1419.

Subcommittee No. 5 reported a broader Title II. It included in the coverage of establishments supported by State action (comparable to the enacted § 201(d), 42 U. S. C. § 2000a(d)) all businesses operating under State "authorization, permission, or license." Hearings, House Judiciary Committee on H. R. 7152, as amended by Subconimittee No. 5, 88th Cong., 1st Sess., 2656. The Attorney General, again testifying, objected to this and urged that Congress not rely on the Fourteenth Amendment generally but specify what establishments would be covered. Hearings, pp. 2656, 2675-2676, 2726.

All this time the private club exception remained intact. If nothing else, therefore, it is reasonably arguable that in light of the action of Subcommittee No. 5 in referring to a "State license," the private club exception provided an ex-

pression of legislative intent not to extend coverage to private clubs but did not reflect any constitutional considerations.

H. R. 7152 was reported to the full House accompanied by a Report of the Judiciary Committee, H. R. Rep. 914, 88th Cong., 1st Sess. As clearly illustrated by Part 2 (pp. 9-15) of that Report, containing the joint views of supporting Republican Committee members, the Commerce Clause formed a substantial basis of Constitutional support for Title II.

The Committee Report itself, at p. 18, explicitly reveals the not unlimited scope of Title II:

> "No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities . . . .
>
> It is, however, possible and necessary for Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination."

Additional views were appended to the Committee Report by Representative Meader. He discussed the Subcommittee proposal, referring (at p. 51) to the "license" language and to the Attorney General's reaction that such an addition "represents an effort to go the full limits of the constitutional power contained in the 14th Amendment." He noted the Attorney General's comment that this language could cause Title II to apply even to law firms. Once again, the lack of reference to the private club exception may at least be viewed as indicating a legislative determination that Congress' constitutional powers should not be extended to private clubs even though this could be done.

Debate on the House floor was not lengthy. It further supports the position that Title II was limited in scope.

That it covered neither all places of public accommodation nor all establishments in which discrimination may be "supported" by the State, but rather aimed at the specific categories defined in § 201(b), is evident in the comments of Congressman Cellar, one of its chief supporters, and in one of the memoranda appended by him to his comments (110 Cong. Rec. 1520, 1525).

The lurking concern about the now-removed "State license" language reappears, however, in the comment of Congressman Tuck who charged that proponents of Title II would make licensing a sufficient indication of State support to constitute State action (110 Cong. Rec. 1586). Once again, there is at least an indication that legislative policy, not constitutional inhibitions, lay behind these decisions and that both the elimination of "licensing" and the still-untouched exception for private clubs simply reflect Congressional intent to leave these areas to other means of redress.

H. R. 7152 went directly to the Senate floor where it was debated for 83 days (see comment of Representative Madden at 110 Cong. Rec. 15869). Moose Lodge has accurately reported (Brief, pp. 89-97) the extent of the discussion on private clubs. While we agree that the private club exception was established with little or no debate or opposition, we find nothing in this reported material which suggests any more than Congress, as a matter of legislative policy, decided not to extend Title II to private clubs.

Despite this seeming clarity, an occasional question arose. Senator Russell charged that Title II would "open every private club in this country to any person who is a member of one of the minority groups covered by this bill" (110 Cong. Rec. 4744). Senators Javits and Humphrey hastened to correct him by referring to § 201(e) but not mentioning any constitutional impediments (110 Cong. Rec. 4755, 6534).

Fairly read, we believe the unusually extended and comprehensive legislative history of H. R. 7152 provides only two clear conclusions for present purposes. First, the primary constitutional authority relied upon by Congress to sustain passage of Title II was Art. I, § 8, cl. 3, of the Constitution, the Commerce Clause. Second, nothing in the hearings, committee reports or debates justify a contention that in providing an exception for private clubs Congress was doing any more than evidencing its decision on a matter of legislative policy rather than constitutional authority. Judicial treatment of Title II supports these conclusions.

3. *Judicial review.*

Title II came before the Court promptly following enactment. It was sustained by a unanimous Court in *Heart of Atlanta Motel, Inc. v. United States,* 379 U. S. 241, as a proper exercise by Congress of the power given Congress under the Commerce Clause. The opinion of the Court expresses several conclusions pertinent here.

First, the Court expressly determined that Title II was based both on the Commerce Clause and the Fourteenth Amendment, that Congress "possessed ample power" to proceed under the former and that it was not necessary for the Court to pass upon Congress' power under the latter. 379 U. S. 241 at 249-250.

Second, nothing in the *Civil Right Cases,* 109 U. S. 3, purported to deal with Congress' power under the Commerce Clause; consequently, those cases are irrelevant to the issue of Congress' authority to pass Title II. 379 U. S. 241 at 252. Nevertheless, as the opinion in those cases pointed out, Congressional power to deal with matters affecting interstate commerce is plenary; and in exercising such power Congress may "pass laws for regulating the subjects specified in every detail, and the conduct and

transactions of individuals in respect thereof.'' 379 U. S. 241 at 251-52.

Third, in exercising its powers under the Commerce Clause, Congress may legislate against moral and social wrongs such as racial discrimination. 379 U. S. 241 at 257.

This opinion unquestionably supports the position stated above that Title II was not just an enactment designed to enforce the Fourteenth Amendment. To the contrary, its paramount source of authority was the Commerce Clause. In addition, the opinion, like President Kennedy's message and the legislative history which preceded it, is devoid of any indications that Congress either was intent upon drawing or actually did draw a fine constitutional line between rights of privacy and private association and the right to be free from state-supported racial discrimination. In view of Congressional reliance on the primary authority of the Commerce Clause, it would be difficult, if not impossible, to reach any other conclusion.

Finally, and most significant, is the indisputably valid fact that given Congress' plenary power to take whatever action is appropriate to achieve its legitimate purpose of ending the obstructions which racial discrimination poses to the free flow of commerce, Congress certainly has the power to deal with and to regulate purely private actions in its furtherance of this end. This being so, Congress, had it so wished, could have included private clubs within the boundaries of Title II. That it chose not to do so can only be considered an expression of policy by it and not an indication of constitutional limits.

A further indication that the Court does not view Title II as limiting any right of action which an individual had, prior to Title II's passage, to redress a deprivation of his Constitutional rights appears in note 5 of the Court's opinion in *Adickes v. S. H. Kress and Company*, 398 U. S. 144 at 150. Miss Adickes' claim, like Irvis' here, was

brought under 42 U. S. C. § 1983. The Court noted that the violation complained of would also support an allegation that Kress and Company had violated Title II. However, the Court concluded that the two provisions were entirely separate and that "there can be recovery under § 1983 for conduct that violates the Fourteenth Amendment even though the same conduct might also violate the Public Accommodations Title . . . ." We take this to mean, at least, that private racial discrimination constituting state action is subject to redress under § 1983 as it has always been and that if this is so with respect to conduct also covered by Title II, it must be so with respect to conduct not covered by Title II. Irvis' action here, therefore, seeking only to enjoin further State support for discrimination and not to end Moose Lodge's privately-chosen segregation, is not precluded by anything contained in Title II, including the exception for private clubs.

B. The Existence of Alternative Constitutional and Statutory Bases for Attacking Racial Discrimination by Private Clubs Makes It Unlikely That Congress, in Adopting Title II, Would Have Been Concerned With Marking a Boundary Between the Right of Private Association and the Fourteenth Amendment Right to Be Free From State-Supported Racial Discrimination.

For Congress to have been sufficiently preoccupied with the rights of privacy and private association arising from private club membership to have marked a constitutional barrier in its adoption of § 201(e) of the Civil Rights Act of 1964 requires, at least, acceptance of the view that Congress would hardly do such a thing unless its action were meaningful. We have seen above that, first, it does not appear Congress did draw a constitutional line and, second, Con-

gressional power under the Commerce Clause is sufficiently extensive to permit it to act against discrimination by private clubs wholly apart from considerations affecting its powers under the Fourteenth Amendment. We conceive of Congressional authority in this respect as being limited only by the proper boundaries of its Commerce Clause power; and if its actions thereunder are justified, any resulting impingement on associational rights would have to give way.

Similarly, we believe other authority also exists for attacking private club discrimination.

The Thirteenth Amendment provides that slavery shall not exist within the United States and that Congress shall have power to enact legislation to enforce this provision.

This extinction of slavery was absolute and self-executing. "By its own unaided force and effect," the Thirteenth Amendment "abolished slavery and established universal freedom." *Civil Rights Cases,* 109 U. S. 3 at 20. The Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Ibid.

Congress' power to implement this Amendment allows it "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Ibid. This includes the power to enact laws "direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." Id. at 23. And the "varieties of private conduct which [Congress] may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery . . . ." *Griffin v. Breckenridge,* 91 S. Ct. 1790 at 1799-1800.

All of these pronouncements of the meaning of the Thirteenth Amendment, made in an 1883 decision, remain valid as ever today. *Jones v. Mayer Co.,* 392 U. S. 409 at 438-39.

We know of no case directly construing the Thirteenth Amendment which has explicitly equated its self-executing scope with Congress' power to enforce it. That is, the Court has not specifically declared that the Amendment itself not only abolished slavery but also abolished all "badges and incidents" of slavery. Nevertheless, it is no great step from what already has been declared to this position; and it would be consistent with the breadth and purpose of the Thirteenth Amendment so to hold.

We have no hesitancy in declaring that the invidious racial discrimination practiced by private clubs is a "badge and incident" of slavery. It is demeaning to our Negro citizens and represents a contemporary prolongation of the pre-Thirteenth Amendment white attitude toward the Negro. We also believe that the intent and scope of this Amendment is such that it must be given overriding significance when it conflicts with other constitutional guarantees. Even allowing, however, for possible balancing when First Amendment rights of free speech and free assembly are involved, we find nothing in this case, where the purposes of the private club are fraternal, to warrant giving the Thirteenth Amendment any narrower effect.

But we go one more step. Even apart from any self-executing effect of the Thirteenth Amendment, we have shown that Congress' power to enact legislation abolishing all "badges and incidents" of slavery is unqualified. From this, two comments follow.

First, Congress is unlikely to have engaged in a delicate constitutional effort by inserting § 201(e) into the Civil Rights Act of 1964, even were (as it is not) Title II based solely upon Fourteenth Amendment considerations, since it has the power under the Thirteenth Amendment to pass legislation affecting private interests, individual and group, without feeling such concern. We state this,

assuming for the moment that Congress has not actually pursued its Thirteenth Amendment powers.

But, second, this is only a temporary assumption. Title 42 U. S. C. § 1981 has been part of our statutory law since 1866 when it was enacted as part of the Civil Rights Act of 1866 in substantially the same language as it now contains. See *U. S. v. Wong Kim Ark*, 169 U. S. 649. It states:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind; and to no other."

This provision applies to private parties; no state action need be shown. See *Jones v. Mayer Co.*, 392 U. S. 409. It can reasonably be argued that the relationship between an individual and his club is a contractual one (dues exchanged for facilities); that, being so, it is subject to § 1981; and that racial discrimination in such contract is prohibited by § 1981.

We see, therefore, that Congress itself has ample power to act directly aganist racial discrimination in private clubs. Not only the Commerce Clause, but the Thirteenth Amendment, gives it this power. As already stated, whatever judicial balancing of rights is required in such circumstances, the associational interests present here do not entail objects and purposes which should prevail over the purpose of ending racial discrimination.

We suggest, therefore, that not only did Congress not in fact draw a constitutional boundary in excepting private

clubs from Title II of the Civil Rights Act of 1964 but that the existence of these other constituitonal and statutory bases for action against discrimination negate any conclusion that it was attempting to do so. Section 201(e) is simply an expression of a legislative decision that private clubs (like unmentioned private homes) were not to be considered places of public accommodation.

CONCLUSION.

The court below correctly determined that there was State action in the invidious racial discrimination practiced by Moose Lodge, and its judgment should be affirmed.

Respectfully submitted,

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